Docket for 02-1657

(8)

No. 02-1657 Status: ARGUED
Title: Randall C. Scarborough, Petitioner
v.
Anthony J. Principi, Secretary of Veterans Affairs
Docketed: May 14, 2003
Lower Ct: United States Court of Appeals for the Federal Circuit
Case Nos.: (00-7172)
Decision Date: February 13, 2003
Rehearing Denied: April 17, 2003

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 9 2003	Petition for writ of certiorari filed. (Response due June 13, 2003)
Jun 6 2003	Order extending time to file response to petition to and including July 14, 2003.
Jul 14 2003	Brief of respondent Anthony J. Principi, Secretary of Veterans Affairs in opposition filed.
Jul 21 2003	Reply of petitioner Randall C. Scarborough filed.
Jul 23 2003	DISTRIBUTED for Conference of September 29, 2003.
Sep 30 2003	Petition GRANTED.
Nov 7 2003	Joint appendix filed.
Nov 7 2003	Brief of petitioner Randall C. Scarborough filed.
Nov 25 2003	Extension of time within which to file respondent's brief on the merits to and including December 24, 2003.
Dec 10 2003	SET FOR ARGUMENT Monday February 23, 2004.
Dec 17 2003	CIRCULATED.
Dec 24 2003	Brief of respondent Anthony J. Principi, Secretary of Veterans Affairs filed. (Distributed)
Jan 12 2004	Record received from the U.S.C.A. for Veterans Claims. (1 envelope)
Jan 14 2004	Record received from the U.S. Court of Appeals for the Federal Circuit. (1 Box)
Jan 28 2004	Reply of petitioner Randall C. Scarborough filed. (Distributed)
Feb 23 2004	Argued. For petitioner: Brian Wolfman, Washington, D.C. For respondent: Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

021657 MAY 9 - 2003

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No. _____

IN THE

Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

May 7, 2003

QUESTION PRESENTED

In December 2001, in an earlier appeal in this case, the United States Court of Appeals for the Federal Circuit held that an attorney's fee application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), is jurisdictionally barred if the fee applicant does not allege, within the statute's 30-day limitations period, that the position of the United States lacked substantial justification, even when the application itself is timely filed and the applicant promptly amends the application to supply the allegation. The Federal Circuit acknowledged that its holding directly conflicted with decisions of other circuits. On June 17, 2002, this Court granted a petition for a writ of certiorari, vacated the Federal Circuit's decision, and remanded in light of *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002). In a nearly verbatim reprise of its earlier ruling, the Federal Circuit again held the fee application jurisdictionally barred. That court again acknowledged the circuit split and then found *Edelman* inapposite. The question presented is the same as that presented in the earlier petition to this Court:

> Whether, or in what circumstances, an applicant for attorney's fees under the Equal Access to Justice Act is barred from obtaining a fee award by the Act's 30-day statute of limitations solely because the applicant's timely-filed fee application did not initially allege that the position of the government in the underlying litigation lacked substantial justification.

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Petitioner Randall C. Scarborough respectfully petitions this Court for a writ of certiorari to review the decision below of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees, on remand from this Court, is reported at 319 F.3d 1346 (Fed. Cir. 2003), and is reproduced in the appendix at 1a. The opinion of the United States Court of Appeals for Veterans Claims dismissing petitioner's fee application is reported at 13 Vet. App. 530 (Vet. App. 2000), and is reproduced at 22a. The original opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees is reported at 273 F.3d 1087 (Fed. Cir. 2001), and is reproduced at 26a. The decision of this Court granting petitioner's first petition for a writ of certiorari and vacating the original judgment of the Federal Circuit for reconsideration in light of *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), is reported at 536 U.S. 920 (2002), and is reproduced at 36a. The unreported post-remand decision of the United States Court of Appeals for the Federal Circuit denying panel rehearing and rehearing en banc is reproduced at 37a. The Federal Circuit's unreported decision denying rehearing and rehearing en banc after its original ruling is reproduced at 39a. The unreported decision of the United States Court of Appeals for Veterans Claims in favor of petitioner on the merits of his disability claim is reproduced at 41a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's fee application was entered on February 13, 2003. Pet. App. 1a.

Petitioner filed a timely petition for rehearing en banc on February 24, 2003, which the Federal Circuit treated as a petition for panel rehearing and for rehearing en banc and denied on April 17, 2003. Pet. App. 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States

> was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

STATEMENT OF THE CASE

On two occasions — both before and after remand from this Court — and in direct conflict with decisions of the Third, Sixth, and Eleventh Circuits, the United States Court of Appeals for the Federal Circuit has held that an application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), is jurisdictionally barred if the application does not, within EAJA's 30-day statute of limitations, allege that the government's position on the merits in the underlying litigation lacked substantial justification. The Federal Circuit came to that conclusion despite this Court's holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), that statutes of limitations running in favor of the federal government presumptively are not jurisdictional, but rather are subject to equitable principles such as tolling, estoppel, waiver, and relation back. In addition, the ruling below is based on an interpretation of EAJA's text that cannot be squared with this Court's holding in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), the decision that this Court directed the court of appeals to consider on remand.

A. The Underlying Litigation Giving Rise To Petitioner's Fee Claim

Petitioner Randall C. Scarborough served in the United

States Navy from 1972 to 1975, when he was discharged because of chronic renal failure. CAVC Record at 56. In 1993, petitioner applied for and was granted disability benefits from the Department of Veterans Affairs ("VA"). The VA agreed with petitioner that his renal failure was incurred during his military service and he was awarded a 100% disability rating. CAVC Record at 343. A dispute arose, however, concerning the effective date of petitioner's disability. Petitioner contended that his service-connected disability dated back to 1975, and challenged a March 1976 VA finding that his renal disease was not service-connected. The Secretary of Veterans Affairs, the respondent in this Court, disagreed, arguing that the VA's 1976 finding was not "clear and unmistakable error," the acknowledged standard for overturning that finding.

Petitioner pursued his case to the Board of Veterans' Appeals ("BVA"), which rejected petitioner's claim of clear and unmistakable error. Petitioner appealed the BVA's decision to the United States Court of Appeals for Veterans Claims ("CAVC"), which had jurisdiction over petitioner's appeal under 38 U.S.C. § 7252(a). The CAVC's July 9, 1999, decision began by noting that petitioner's case was appropriate for decision by a single judge because it was one "of relative simplicity and the outcome [was] not reasonably debatable." Pet. App. 41a (quoting *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (Vet. App. 1990)). The CAVC then reversed the BVA's decision on the ground that the BVA had failed to consider the legal standards governing whether the 1976 finding was infected with clear and unmistakable error and remanded the case for further determinations regarding the validity of that finding. Pet. App. 42a-43a. On remand, petitioner was awarded retroactive benefits for the period 1975 to 1993.

B. Applicable EAJA Principles

To understand the dispute over petitioner's fee application, it is necessary briefly to review applicable EAJA principles. In general, EAJA provides that attorney's fees and expenses "shall" be awarded to eligible parties who have prevailed in litigation against the federal government, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Individuals are eligible for fees if their net worth does not exceed $2 million. *Id.* § 2412(d)(2)(B). To meet the substantial justification standard, the government bears the burden of showing that its position had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Hundreds of EAJA applications are considered each year by the CAVC. *See* CAVC Annual Reports (http://www.vetapp.uscourts.gov/About Court/AnnualReport.asp).[1]

Of particular relevance here, EAJA provides that a party seeking fees shall submit its fee application within 30 days of "final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). "Final judgment" is defined as "a judgment that is final and not appealable...." *Id.* § 2412(d)(2)(G). The first sentence of subsection (d)(1)(B) describes the information to be included in the fee application:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other

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[1]In 2000, the year in which the CAVC dismissed petitioner's fee application, 634 EAJA applications were granted, 32 were denied, and 110 were dismissed. *See id.*

> expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Id. § 2412(d)(1)(B). It is undisputed that petitioner's fee application was submitted "within thirty days of final judgment" and contained all of the information called for by this sentence. *See* Fed. Cir. Jt. App. 13-19.

The next sentence of subsection (d)(1)(B) — not the sentence containing the 30-day filing period — states that "[t]he party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Petitioner's initial fee application did not contain this allegation; however, as discussed further below, petitioner amended his application to add the allegation immediately after respondent moved to dismiss his application on the ground that it did not contain the allegation. Fed. Cir. Jt. App. 6.

C. Proceedings On Petitioner's Fee Application In The Court Of Appeals For Veterans Claims

On July 20, 1999, just 11 days after he prevailed on the merits in the CAVC, petitioner submitted an EAJA application seeking attorney's fees and expenses of $19,333.75 and served the application on counsel for respondent. Fed. Cir. Jt. App. 21-22. However, the Clerk of the CAVC did not file the application. Instead, under a notice dated July 23, 1999, the

Clerk returned the application to petitioner on the ground that his EAJA application was filed too soon because it may only be filed within 30 days "after the Court's judgment becomes final," and that finality does not occur until after the time for filing post-decision motions and appealing to the Federal Circuit has expired. Fed. Cir. Jt. App. 20.

On August 19, 1999, petitioner submitted a second EAJA application. At the same time petitioner submitted that fee application, he served it on counsel for respondent. Under then-applicable CAVC Rule 39(c), respondent was required to serve and file his response to the application within 30 days of service of the fee application upon him, but respondent failed to do so. Meanwhile, petitioner's fee application was not immediately filed by the CAVC Clerk. Rather, the Clerk once again deemed the application "premature" on the ground that the CAVC's mandate had not yet issued in the underlying litigation and therefore, according to the Clerk, there was still no "final judgment" in the action. Pet. App. 23a. On October 4, 1999, after issuance of the mandate, the CAVC Clerk filed petitioner's fee application. Fed. Cir. Jt. App. 12.[2]

After the application was filed, respondent obtained an extension of time to answer the fee application (to which petitioner had consented) to December 3, 1999. *See* Fed. Cir. Jt. App. 3. On that date, respondent moved to dismiss the fee application for lack of subject matter jurisdiction. Respondent

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[2]The CAVC apparently views EAJA's 30-day limitations period as fixing not only the *last day* on which a fee application *must* be filed but also the *first day* on which a fee application *may* be filed. *But see Shalala v. Schaefer*, 509 U.S. 292, 303 (1993) (holding EAJA fee application timely even where no final judgment was ever entered).

argued that, although the fee application was timely filed, petitioner had not made an allegation that respondent's position lacked substantial justification within the now-expired 30-day period. Respondent relied on the text of EAJA, which it claimed required the no-substantial-justification allegation to be made within the 30-day period, and on *Bazalo v. West*, 150 F.3d 1380, 1381, 1383 (Fed. Cir. 1998), which held that the 30-day period is "jurisdictional."

Immediately after receiving respondent's motion to dismiss, petitioner filed an amendment to his fee application alleging that "[t]he government's position that the Appellant had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." Fed. Cir. Jt. App. 6 (Dec. 9, 1999). At the same time, petitioner opposed the motion to dismiss, arguing that his earlier omission of the no-substantial-justification allegation was not a jurisdictional defect. Petitioner also relied on *Bazalo*, which, although stating that EAJA's limitations period is jurisdictional, held that a fee applicant's failure to make a net-worth eligibility allegation within the 30-day period was not a jurisdictional bar if the fee applicant had alleged that he was the prevailing party — which, the court held, "subsume[s]" the net worth issue — and the government is not prejudiced by the omission. *See Bazalo*, 150 F.3d at 1382, 1383-84. Petitioner also urged that the limitations period be tolled, and that the government be estopped from enforcing it, because the government itself had delayed the case by seeking an extension to file its response to the application (and obtaining petitioner's consent to that extension) and had never sought information from petitioner on the substantial justification question despite having been served with the application months earlier.

On June 14, 2000, the CAVC dismissed petitioner's fee

application on the grounds urged by respondent. Pet. App. 22a-25a.

D. Initial Proceedings And Decision In The Federal Circuit

Petitioner appealed to the Federal Circuit. He contended that EAJA requires only that the application itself, not the no-substantial-justification allegation, be made within the 30-day period. He also argued that the government was estopped from relying on that deadline because it had a lengthy opportunity to bring the alleged defect to petitioner's attention if it truly desired the missing information or wanted to avoid delay. In this regard, petitioner pointed to CAVC Rule 39(c), which required the government to respond to the fee application within 30 days of service of the application and which, if complied with, would have brought the omission to petitioner's attention well before the 30-day period expired.[3]

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[3]As petitioner put it below:

> Clearly government's counsel saw the defect in the application and knew that if the government responded within the 30 day requirement of Rule 39, the Veteran would have amended the application to comply with 28 U.S.C. §2412. Rather than show its cards to the Veteran, the government decided to wait until 30 days had passed the final judgment date when it would [in respondent's view] be too late for the Veteran to make a timely supplement to the application.

Brief for Appellant, at 10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000). The government did not deny that it knew

(continued...)

Petitioner also relied on this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which held that, absent statutory language to the contrary, limitations periods for claims against the federal government, like those involving private defendants, are not jurisdictional bars, but rather are subject to ordinary equitable principles, such as tolling and estoppel. Finally, petitioner argued that his amendment to the fee application should have been accepted because the burden of showing substantial justification is on the government. EAJA, petitioner noted, mandates an award of fees to a prevailing party "unless" the court finds that the government's position is substantially justified, 28 U.S.C. § 2412(d)(1)(A), and thus EAJA requires the government to carry the burden on the substantial justification issue whenever it wishes to avoid payment of fees to a prevailing party.

The Federal Circuit affirmed. The court first stated its understanding of 28 U.S.C. § 2412(d)(1)(B). That section, the court said, specifies that a fee applicant shall, within 30 days of final judgment, submit an application stating (1) that the applicant is a prevailing party, (2) that the applicant is eligible to receive fees (the net-worth allegation), (3) the amount sought, including an itemization, and (4) that the position of the United States was not substantially justified. Pet. App. 29a; *see also* Pet. 30a ("The same mandatory language ('shall') is used with respect to the thirty-day time limit as with the other four

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[3](...continued)
of the alleged defect and deliberately waited for the 30-day period to pass, but maintained that "the timing of the Government's filing does not relieve an applicant of the jurisdictional burden to submit a complete and timely EAJA application." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

requirements..."). The court started from the premise that "the thirty-day time limit for submitting a fee application under the EAJA [is] jurisdictional in nature" (Pet. App. 30a), and then posed what it viewed as the question before it: "whether the other four requirements enumerated in the EAJA statute are likewise jurisdictional." *Id.* It answered that question "yes," holding that EAJA's "plain language" requires not only that an application be filed within 30 days of final judgment, but that the application contain averments about all four topics mentioned in section 2412(d)(1)(B), including a lack of substantial justification. Pet. App. 33a. The court acknowledged a direct conflict with decisions of the Third and Eleventh Circuits, which held that a timely-filed EAJA fee application may be supplemented to supply information on those four topics absent prejudice to the government. *See* Pet. App. 30a-32a.

Petitioner sought rehearing en banc, which was denied on February 25, 2002. Pet. App. 15a.

E. Initial Proceedings Before This Court And The Intervening Decision In *Edelman*

On March 13, 2002, petitioner filed a petition for a writ of certiorari. Petitioner urged review principally on the grounds that the Federal Circuit's decision had created a division among the circuit courts and could not be reconciled with the Court's decision in *Irwin*. *See* Petition for a Writ of Certiorari, *Scarborough v. Principi*, No. 01-1360 (filed Mar. 13, 2002).

Shortly after the petition was filed, this Court decided *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002). In that case, plaintiff Edelman filed a letter with the EEOC claiming that Lynchburg College had discriminated against him in

violation of Title VII of the Civil Rights Act of 1964. 122 S. Ct. at 1149. Although the parties disagreed about whether the letter constituted a formal "charge" of discrimination, the Court assumed that it was a "charge" for the purposes of its decision. *See id.* at 1152. Edelman and the College agreed that the letter was filed within the relevant limitations period set forth in section 706(e)(1) of the Act, 42 U.S.C. § 2000e-5(e)(1), which requires that a charge be filed within 300 days of the alleged discrimination. Another provision of the same section of the Act, section 706(b), 42 U.S.C. § 2000e-5(b), requires that a charge be verified, *i.e.*, "be in writing under oath or affirmation...." Edelman met this requirement as well, but not until after the 300-day limitations period of section 706(e)(1) had expired. 122 S. Ct. at 1148.

Edelman relied on an EEOC regulation that provides that a charge is "sufficient" when the EEOC receives from the complaining party "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* at 1148 n.2 (quoting 29 C.F.R. § 1601.12(b)). Under that regulation, a charge may be amended to cure "technical defects or omissions, including failure to verify the charge" and such amendments "will relate back to the date the charge was first received." *Id.* The Fourth Circuit held the regulation invalid, and Edelman's charge untimely, reasoning that because the statute requires a charge to be filed within 300 days and, separately, requires that a charge be verified, it must also require that a verified charge be filed within 300 days. *Id.* at 1148.

This Court reversed. It immediately took issue with the Fourth Circuit's syllogism: "Section 706(b) merely requires verification of a charge, without saying when it must be verified; §706(e)(1) provides that a charge must be filed within

a given period, without indicating whether the charge must be verified when filed." *Edelman*, 122 S. Ct. at 1149. The Court then explained why the EEOC's relation-back regulation is an "unassailable interpretation of §706." *Id.* at 1152. First, the Court said, applying the limitations period to verification "would ignore the two quite different objectives of the timing and verification requirements." *Id.* at 1149. The former puts the employer on notice of a claim before it gets stale and promotes speedy resolution of claims; the latter, by contrast, only seeks to assure that a complainant is "serious enough and sure enough" of the claim to support it under penalty of perjury. *Id.* Thus, the EEOC simply requires a complaint to be completed and verified before it requires the employer to respond. *Id.* at 1150 & n.9.

The Court also noted that it would be "hard pressed" to take a different view in light of its recent ruling in *Becker v. Montgomery*, 532 U.S. 757 (2001). *Edelman*, 122 S. Ct. at 1152. In *Becker*, the question was whether a timely-filed but unsigned notice of appeal was jurisdictionally defective because an amended notice providing the signature was filed only after the time to appeal had expired. In reversing the Sixth Circuit, *Becker* held that although a notice of appeal, like other district court filings, must be signed, signature is not a jurisdictional requirement. Therefore, so long as the notice itself was timely filed, the amendment containing the signature related back to the original filing. *See Edelman*, 122 S. Ct. at 1151 (discussing *Becker*). The *Edelman* court noted that permitting relation back in the EEOC administrative context was at least as reasonable as permitting it in the court context in *Becker*. *Id.* ("courts have shown a high degree of consistency in accepting later verification as reaching back to

an earlier, unverified filing.") (citing cases).[4]

On June 17, 2002, this Court granted the petition, vacated the Federal Circuit's decision, and remanded the case for further consideration in light of *Edelman*. Pet. App. 36a.

F. The Federal Circuit's Decision on Remand

After supplemental briefing before the same panel that heard the original appeal, the Federal Circuit again affirmed dismissal of petitioner's fee application, this time in a 2-1 decision, with Chief Judge Mayer dissenting. In the main, the panel majority simply reaffirmed its prior decision, holding that both EAJA's filing deadline *and* the pleading requirements contained in 28 U.S.C. § 2412(d)(1)(B) are "jurisdictional" and therefore must all be met within the 30-day time period. In that respect, the court's two opinions are verbatim the same or nearly so. *Compare* Pet. App. 28a-34a (initial opinion), *with* Pet. App. 4a-11a (post-remand opinion). The majority also

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[4]One final point regarding *Edelman* is significant. This Court was urged to decide whether the EEOC's relation-back regulation was entitled to deference as a reasonable interpretation of purportedly ambiguous statutory provisions. However, it did not reach that issue, which allowed it to avoid the complicated question whether the EEOC regulation was the kind of administrative pronouncement entitled to deference. *Compare Edelman*, 122 S. Ct. at 1150 & nn.7-8 (majority opinion), *with id.* at 1153-55 (O'Connor, J., concurring in the judgment). Rather, the Court found no ambiguity: "We find the EEOC rule not only a reasonable one, *but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch*." *Id.* at 1150 (emphasis added). Thus, *Edelman*'s relation-back holding arises solely from the statute itself, and the EEOC's regulation has no bearing on *Edelman*'s applicability to petitioner Scarborough's case.

concluded that *Edelman* was inapposite. It noted that *Edelman* was premised on the notion that the timely filing of a Title VII charge and the requirement that a charge be verified serve different purposes — repose on the one hand and the weeding out of frivolous claims on the other. *See Edelman*, 122 S. Ct. at 1149. In the majority's view, however, EAJA's filing deadline and the requirement that the fee applicant allege a lack of substantial justification serve the same purpose: to establish jurisdictional prerequisites for a fee award or, in the panel's words, to provide "the basis for the award itself." Pet. App. 14a.

Chief Judge Mayer disagreed, explaining that *Edelman* "implies that failure to timely include a simple allegation that does not prejudice the opposing party may relate back to a timely filed application." Pet. App. 19a. In addition, he noted that the majority had "unnecessarily narrow[ed] the waiver that Congress intended because the statutory language of ... EAJA does not mandate strict compliance or foreclose supplementation" of the fee application. *Id.* The purpose of the no-substantial-justification allegation, he maintained, was not to set a jurisdictional bar, but only "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified...." Pet. App. 20a (quoting S. Rep. No. 96-974, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4726, 4992).

Petitioner sought rehearing en banc, which was denied on April 17, 2003. Pet. App. 37a.

REASONS FOR GRANTING THE WRIT

A. THE FEDERAL CIRCUIT'S DECISION CREATES A DIVISION AMONG THE FEDERAL COURTS OF APPEALS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

1. As the Federal Circuit recognized (Pet. App. 7a-10a), its decision directly conflicts with decisions of the Third and Eleventh Circuits (and, as shown below, with a decision of the Sixth Circuit as well). In *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000), the court considered whether an EAJA fee applicant was jurisdictionally barred from recovery because she sought, after expiration of the 30-day filing period, to supplement her fee application to supply a net-worth allegation and "to allege that the Commissioner's position in the district court was not substantially justified," *id.* at 857, *the exact question presented here*. The Eleventh Circuit acknowledged that waivers of sovereign immunity should not be extended "beyond the limits set by Congress," *id.* at 858, but noted that courts should be careful not to impose "an undue narrowing of the waiver intended by Congress." *Id.* The court distinguished section 2412(d)(1)(B)'s limitations period itself from the statute's pleading requirements, holding "that the government's interest in finality and reliance are satisfied once a timely EAJA application has been filed." *Id.* *Singleton* thus held that the statute's pleading requirements are not jurisdictional, and remanded the case for proceedings on the merits of the applicant's fee claim. *Id.* "[N]ot unmindful" of the government's interests, however, the Eleventh Circuit also noted that courts have the power to order rapid completion of EAJA applications or to deny them entirely where delayed pleading prejudices the government. *Id.*

Singleton relied on the Third Circuit's decision in *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), which also squarely conflicts with the decision below. In *Dunn,* the district court had dismissed, as jurisdictionally defective, a fee application that did not initially include the specific amount requested, an itemized statement of attorney time expended, or the rate at which fees were to be computed, even though the fee applicant had supplied the missing information shortly after the 30-day period had expired. *Id.* at 101-02. The Third Circuit reversed. The court explained that section 2412(d)(1)(B) contains two separate requirements — a deadline for filing and a pleading standard — and that "[t]he two requirements serve different purposes." *Id.* at 103. Although filing the fee claim within a certain time period serves the government's interest in finality and reliance, *id.* at 103-04, "once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied." *Id.* at 104. For these reasons, *Dunn* concluded that section 2412(d)(1)(B)'s pleading requirements are not jurisdictional and that a court may, absent prejudice to the government, permit supplementation of the fee application after expiration of the 30-day filing period. *But see id.* at 105 (Adams, J.) (dissenting from holding in *Dunn* on same grounds relied on by Federal Circuit below).

Although not mentioned by the Federal Circuit, the Sixth Circuit has also adopted the Third Circuit's reasoning in *Dunn*. *See United States v. True*, 250 F.3d 410 (6th Cir. 2001). *True* involved a fee application under the Hyde Amendment, which authorizes an award of attorney's fees to certain defendants who prevail in criminal litigation with the United States and expressly adopts all of "the procedures and limitations (but not the burden of proof)" set forth in EAJA. *Id.* at 414 n.1 (quoting Pub. L. No. 105-119, § 617, 111 Stat. 2519

(1997)). The government argued that True's timely-filed fee application was jurisdictionally barred because it had not alleged True's net worth or provided an itemized fee statement under 28 U.S.C. § 2412(d)(1)(B). *Id.* at 418. The Sixth Circuit rejected that argument and held that the "pleading requirements" of section 2412(d)(1)(B), as opposed to its 30-day filing deadline, are not jurisdictional, and that therefore "timely but flawed applications [do] not deprive the lower court of jurisdiction" to entertain the application. *Id.* at 421. The government conceded below that *True* conflicts with the Federal Circuit's decision in this case. *See* Appellee's Response to Petition for Rehearing En Banc, at 5-6, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Mar. 25, 2003).[5]

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[5]Although it did not frame the issue in terms of timeliness under section 2412(d)(1)(B), the Ninth Circuit's decision in *Thomas v. Peterson*, 841 F.2d 332 (9th Cir. 1988), also cannot be squared with the decision below. In that case, the court agreed with the government that the fee applicant had not adequately pleaded EAJA's net-worth requirements for organizational parties because the applicant did not state how many employees it had. *Id.* at 337; *see* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(B). The Ninth Circuit did not dismiss the application, but rather remanded the case to allow the missing information to be presented to the district court, 841 F.2d at 337, a ruling that presupposes that the net-worth allegation did not have to be made within the 30-day filing period. In addition, a number of district court decisions are at odds with the Federal Circuit's ruling below and permit a fee applicant to supplement an otherwise timely fee application to provide information called for by section 2412(d)(1)(B). *See Olenhouse v. Commodity Credit Corp.*, 922 F. Supp. 489, 491 (D. Kan. 1996); *FDIC v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990); *City of Brunswick v. United States*, 661 F. Supp. 1431, 1439 (S.D. Ga. 1987), *rev'd on other grounds*, 849 F.2d 501 (11th Cir. 1988). Other (continued...)

2. Not only is the division among the appellate courts irreconcilable, but the question presented is important and calls for this Court's immediate resolution, particularly now that the Federal Circuit has re-established the circuit conflict after the remand from this Court. One of Congress's concerns in enacting EAJA was that "the cost of contesting a Government order ... [can] exceed[] the amount at stake ...[,]" H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4988, as may often be the case when disability benefits or small government contracts are at stake. If, as petitioner maintains, the Federal Circuit's decision is incorrect, Congress's goal would be undermined because petitioner would be required to forgo his EAJA attorney's fees, thus significantly eroding the value of disability benefits wrongfully denied him for many years.

Unless corrected, the decision below will have an adverse effect on veterans who have prevailed in benefits disputes with the VA. *See Urquhardt v. Principi*, 2003 WL 1463586 (Vet. App. Mar. 19, 2003) (dismissing fee application for lack of jurisdiction based on ruling below). Indeed, in the time between the CAVC's fee decision below and this Court's decision vacating the original panel opinion, a significant number of fee applications against respondent were held jurisdictionally barred on the basis of the CAVC's decision, demonstrating the significant impact that the Federal Circuit's

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[5](...continued)
district courts agree with the Federal Circuit's approach. *See Sierra Club, Ill. Chapter v. Brown*, 1999 WL 652047, at *2-*3 (N.D. Ill. Aug. 20, 1999); *FDIC v. Fleischer*, 1996 WL 707030, at *4 n.4 (D. Kan. Oct. 16, 1996); *United States v. Hopkins Dodge Sales, Inc.*, 707 F. Supp. 1078, 1080-81 (D. Minn. 1989).

ruling will have unless this Court intercedes.[6]

Moreover, the fact that the decision below arises from the Federal Circuit is quite important, because, in addition to the large number of EAJA applications before the CAVC, *see supra* note 1, the Federal Circuit has appellate authority over many proceedings involving the federal government that are subject to EAJA, such as government contract cases, 28 U.S.C. § 1295(a)(10); *see* 5 U.S.C. § 504(b)(1)(C); GSA Board of Contract Appeals Rule 135 (procedure for seeking EAJA fees) (available at http://www.gsbca.gsa.gov/Rules.pdf), and matters arising from the United States Court of Federal Claims. *See* 28 U.S.C. §§ 1295(a)(3), 2412(d)(2)(F). In addition, EAJA applies to proceedings involving the government in the Federal Circuit itself, including appeals from decisions of the Merit Systems

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[6]*See Smith v. Principi*, 2001 WL 1403609 (Vet. App. Oct. 31, 2001) (dismissing fee application for failure to allege prevailing-party status; denying applicant's request to amend application outside of 30-day period under CAVC's decision in *Scarborough*); *Banks v. Principi*, 2000 WL 33582650 (Vet. App. Oct. 11, 2001) (dismissed for omission of no-substantial-justification allegation under *Scarborough*); *Wooten v. Principi*, 2001 WL 1079065 (Vet. App. Sept. 5, 2001); *Anania v. Principi*, 2001 WL 881641 (Vet. App. July 27, 2001) (dismissed for omission of no-substantial-justification allegation under *Scarborough*); *Clipper v. Principi*, 2001 WL 668926 (Vet. App. May 10, 2001) (same); *Lee v. Gober*, 14 Vet. App. 204 (Vet. App. 2000) (same; also rejecting equitable tolling); *see Urquhardt v. Principi*, 2001 WL 1021060 (Vet. App. Aug. 24, 2001) (raising *sua sponte* whether application should be dismissed for failure to include "all of the items described in *Scarborough*"). The CAVC had taken the same position in earlier rulings that were not appealed to the Federal Circuit. *See Graves v. Browning*, 15 Vet. App. 160 (Vet. App. 1996); *Franklin v. Brown*, 7 Vet. App. 388 (Vet. App. 1995).

Protection Board, 28 U.S.C. § 1295(a)(9); *see Olsen v. Department of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) (EAJA fees available in appeals from MSPB), agency Boards of Contract Appeals, and the CAVC.

B. THE DECISION BELOW IS AT ODDS WITH THIS COURT'S DECISIONS IN *IRWIN* AND *EDELMAN*, AND THE TEXT AND STRUCTURE OF EAJA, AND IT EVIDENCES A LONGSTANDING CIRCUIT SPLIT ON THE QUESTION WHETHER EAJA'S LIMITATIONS PERIOD IS "JURISDICTIONAL."

1. The Federal Circuit erred in conceiving of EAJA's time limit as jurisdictional because it ignored — indeed, did not even cite — the key precedent on point. As noted earlier, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court held that 42 U.S.C. § 2000e-16(c) — which allows an employee aggrieved by final action of the Equal Employment Opportunity Commission 30 days to file a Title VII action in federal court — is not jurisdictional, but rather operates like a statute of limitations subject to equitable principles, such as tolling, waiver, and estoppel. The Court concluded, as a general matter, that once Congress has waived the government's sovereign immunity (as it has in EAJA), there is a rebuttable presumption that those equitable principles apply to the same extent as in a suit among private parties, and that, therefore, limitations periods in actions against the government are not jurisdictional unless Congress has explicitly so provided. *Id.* at 96.

Moreover, *Irwin* expressly held that a statutory limitations period is not jurisdictional simply because it uses

assertedly mandatory language such as "shall." Such an approach, the Court held, "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95; *see also Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (rejecting special accrual rule where government is defendant and noting "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties") (quoting *Irwin*, 498 U. S. at 95).

In addition to *Irwin*, the majority below ignored two important textual reasons why EAJA's 30-day period is not jurisdictional. First, the Federal Circuit's ruling disregards the first sentence of EAJA, which provides that a court shall award fees to a prevailing party "in any civil action ... brought by or against the United States *in any court having jurisdiction of that action*." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The highlighted language recognizes that a court entertaining an EAJA application *already* has jurisdiction. *Cf. Luna v. Dept. of HHS*, 948 F.2d 169, 173 (5th Cir. 1991) (indicating that court's jurisdiction was based not on EAJA, but on Social Security Act, which was basis for plaintiff's claim on merits). Here, petitioner properly invoked the CAVC's jurisdiction in 1998 when he filed his disability appeal, and it would be strange, indeed unprecedented, to require a litigant to establish jurisdiction in the same court twice. Thus, an EAJA application is not intended to establish jurisdiction in the court in which it is filed. That alone differentiates an EAJA application from the cases involving notices of appeal upon which the Federal Circuit relied (Pet. App. 16a-17a), because a notice of appeal serves to give a court jurisdiction over a case in the first instance.

Second, as noted above (at 5, 10), EAJA places the burden of demonstrating substantial justification on the government (not on the fee applicant to demonstrate a lack of substantial justification). *See* 28 U.S.C. § 2412(d)(1)(A) (fees "shall" be awarded to the prevailing party, "unless" the court finds the position of the government was substantially justified). Thus, the government must carry that burden to avoid payment of fees to a prevailing party. *See, e.g., True*, 250 F.3d at 419 n.7 (citing cases); *see also* H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 11, 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 140, 141; H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10-11, 16, 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4989, 4995, 4997. In light of that fact, it is unlikely that Congress would, in 28 U.S.C. § 2412(d)(1)(B), have imposed the strict jurisdictional bar that the Federal Circuit erected here, a bar that has produced serious harm to otherwise eligible fee applicants without any countervailing benefit.

Despite *Irwin* and EAJA's text, a number of circuit courts, in addition to the Federal Circuit, have held that EAJA's 30-day period is jurisdictional. *See* Pet. App. 6a (citing cases). None of those cases even cites *Irwin*, and most of them rely on pre-*Irwin* precedents that simply assume that the government is entitled to special treatment when invoking a time bar — exactly the opposite approach from the rule adopted in *Irwin*. *See, e.g., Yang v. Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994) (relying on *Columbia Mfg. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983)); *Buck v. Sec'y of HHS*, 923 F.2d 1200, 1202 (6th Cir. 1991) (relying on *Allen v. Sec'y of HHS*, 781 F.2d 92, 94 (6th Cir. 1986)). On the other hand, the Fifth Circuit has held that EAJA's 30-day period is not jurisdictional and thus is subject to equitable tolling. *See Luna*, 948 F.2d at 173; *see also Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992) (EAJA's 30-day period not jurisdictional under *Irwin*); *Golbach v.*

Sullivan, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same). This split in the circuits provides another reason to grant review.[7]

Irwin's discussion of equitable tolling principles illuminates the error committed by the Federal Circuit. This Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3 (citing cases); *see also Young v. United States*, 122 S. Ct. 1036, 1040-41 (2001) (reiterating *Irwin*'s tolling categories). Here, *according to respondent*, petitioner "fil[ed] a defective pleading during the statutory period[.]" In other words, even assuming that omitting the no-substantial-justification allegation was a defect, it is undisputed that petitioner's otherwise complete application was filed "during the statutory period," and thus, under *Irwin*, petitioner would be entitled to have the 30-day period tolled. This tolling principle is effectively the rule adopted by the Eleventh Circuit in *Singleton* and the Third Circuit in *Dunn*: When an EAJA application is filed within the 30-day period, the application may be supplemented at a later date to meet the statute's pleading requirements, absent prejudice to the government. *See also True*, 250 F.3d at 418 n.5; *cf. Becker v. Montgomery*, 532 U.S. 757 (2001) (appellant's omission of required signature on

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[7]The government acknowledges this circuit split as well. *See* Appellee's Response to Petition for Rehearing En Banc, at 15 n.8, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Mar. 25, 2002). We reiterate that, except for the Federal Circuit, even those circuits that hold that EAJA's *filing* deadline is jurisdictional also hold that its *pleading* requirements are not. *E.g., Dunn*, 775 F.2d at 103-04; *see supra* at 16-18.

notice of appeal is not jurisdictional defect, and signature may therefore be supplied after 30-day filing period imposed by Fed. R. App. P. 4).[8]

2. In two major respects, the Federal Circuit's ruling is irreconcilable with *Edelman v. Lynchburg College*, as this Court's prior remand based on that case suggests. The first is based on the textual similarities between 28 U.S.C. § 2412(d)(1)(B) of EAJA and section 706 of Title VII at issue in *Edelman*. As for EAJA, the Federal Circuit erred when it said that the 30-day filing period applies to all four pleading requirements contained in section 2412(d)(1)(B). *See* Pet. App. 4a, 5a. That is *not* what the statute says. The first sentence of section 2412(d)(1)(B), which contains the 30-day filing deadline for an "application," says that the "application" shall contain statements concerning prevailing-party status, the applicant's eligibility (net worth), and the amount of fees sought. The next sentence — which does not include any reference to the 30-day period or to the "application" — says that the "party shall also allege that the position of the United States was not substantially justified." *See* 28 U.S.C. § 2412(d)(1)(B). Thus, just as in *Edelman*, where the

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[8]Petitioner also urges tolling or estoppel on the ground that the pleading defect, if any, was induced by the government's misconduct. As explained earlier (at 7-9), petitioner submitted his fee application to the CAVC and served it on respondent before the 30-day period had started to run. If the government had complied with CAVC Rule 39(c), it would have answered the fee application within 30 days of service, which would have brought the alleged defect to petitioner's attention well before the 30-day period had expired. Respondent's non-compliance with the applicable CAVC Rule strongly suggests that respondent deliberately ensnared petitioner in a procedural trap by waiting to respond until after the 30-day period expired.

requirement that an EEOC charge be filed within 180 days was held not to apply to the requirement that the charge be verified, so too here, EAJA's 30-day filing requirement, contained in the first sentence of 28 U.S.C. § 2412(d)(1)(B), should not be superimposed on the no-substantial-justification allegation requirement, which is contained in the second sentence and has no deadline at all. Under this reading of the statute, the question is not whether EAJA's 30-day period is "jurisdictional," but whether the Federal Circuit erred by misconstruing the plain language of section 2412(d)(1)(B). *See Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another") (internal quotation marks and citation omitted). The Federal Circuit's misunderstanding of the statutory text further illuminates the split in authority between its decision and that of the Eleventh Circuit in *Singleton*, which came to the opposite conclusion on whether a fee application is jurisdictionally barred if the allegation that the government's position lacked substantial justification is not made within the 30-day period.

Second, *Edelman* held that a Title VII complainant's verification of an EEOC charge filed after the statute of limitations has run "relates back" to the date on which the EEOC charge itself is filed. Under *Edelman*, petitioner's amendment supplying the no-substantial-justification allegation relates back to his original, timely-filed fee application. The relation-back standard discussed in *Edelman* is that amendments to pleadings or other requests for relief relate back if they arise out of the subject matter of the original filing and the amendment would not prejudice the adverse party. *See* 122 S. Ct. at 1150 (relation-back doctrine applied by EEOC so as not to prejudice employers); *see also id.* at 1150 & nn.10, 12

(citing cases applying doctrine); *accord* Fed. R. Civ. P. 15(c)(2) ("amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading") (cited in *Edelman*, 122 S. Ct. at 1151 n.10). That is essentially the position of the Third, Sixth, and Eleventh circuits regarding EAJA's pleading requirements: If the application itself is timely, it may be amended later to satisfy the pleading requirements, absent prejudice to the government. *See True*, 250 F.3d 410; *Singleton*, 231 F.3d 853; *Dunn*, 775 F.2d 99.

Petitioner's amendment to his fee application easily meets *Edelman*'s relation-back standard because the amendment indisputably arose out of the same subject matter as the original filing — the claim for fees arising from the CAVC's disability determination. And the government has never claimed prejudice here. Petitioner amended his application immediately after being informed that it was missing the no-substantial-justification allegation. At that point, the fee application could have been litigated on its merits without any delay or prejudice to the government or the court system.

Applying the relation-back doctrine is particularly appropriate here because EAJA provides the government with a substantial-justification defense in every case. Thus, the omitted statement — the no-substantial-justification allegation — is implicit in every EAJA application. Moreover, as explained above, in contrast to EAJA's other pleading requirements, EAJA places the burden of proof regarding substantial justification on the government, not the fee applicant. *See* 28 U.S.C. § 2412(d)(1)(A); *accord True*, 250

F.3d at 419 n.7 (citing cases). Thus, it is highly unlikely that a short-lived omission of a no-substantial-justification allegation could ever prejudice the government.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Wolfman
(Counsel of Record)
Scott L. Nelson
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

May 7, 2003 Counsel for Petitioner

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[9]Petitioner's omission was not that he failed to plead a factual basis for the no-substantial-justification allegation, which EAJA does not require, but simply that he did not plead a particular formulaic legal conclusion. Courts have consistently allowed relation-back when the only defect is an alleged failure to plead a legal conclusion. *See Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 712-13 (E.D. Pa. 1976) ("the failure to attach a legal conclusion, such as sexual discrimination, to the factual occurrences complained of has been interpreted to be a 'technical defect' . . . and, as such, an amended charge remedying the defect relates back to the original filing date."); *accord Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 202 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970).

United States Court of Appeals for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: February 13, 2003

Before MAYER, Chief Judge, RADER, and LINN, Circuit Judges.

Opinion for the court filed by Circuit Judge LINN. Dissenting opinion filed by Chief Judge MAYER.

LINN, Circuit Judge.

Randall C. Scarborough ("Scarborough") appeals from a dismissal by the United States Court of Appeals for Veterans Claims ("Veterans' Court") for lack of subject matter jurisdiction over his application for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). On December 10, 2001, this court entered judgment affirming the dismissal by the Veterans' Court

because Scarborough's fee application failed to comply with the jurisdictional prerequisites of the EAJA statute. Scarborough v. Principi, 273 F.3d 1087 (Fed. Cir. 2001). Scarborough petitioned for review by the Supreme Court, and on June 17, 2002, the Court granted certiorari, vacated our decision, and remanded the case to this court for consideration in light of Edelman v. Lynchburg College, 535 U.S. 106, 122 S. Ct. 1145 (2002). Scarborough v. Principi, 122 S. Ct. 2584 (June 17, 2002).

Following remand from the Supreme Court, this court's mandate was vacated, the case was returned to the panel, and we requested additional briefing from the parties regarding the applicability of Edelman to the current case. Scarborough v. Principi, 47 Fed. Appx. 931 (Sept. 18, 2002). Based on the Supreme Court's instruction and the supplemental briefing from the parties, we have reconsidered this case and, once again, affirm the decision of the Veterans' Court, dismissing Scarborough's EAJA application for lack of subject matter jurisdiction.

BACKGROUND

After prevailing in the underlying litigation, but before the Veterans' Court entered its mandate, Scarborough submitted an application for attorney fees and expenses to the Veterans' Court under the EAJA, 28 U.S.C. § 2412(d). On October 4, 1999, following the issuance of the mandate, the clerk of the Veterans' Court filed Scarborough's EAJA application. The application contained a showing that: (1) Scarborough was the prevailing party pursuant to the July 1999 remand order; (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4)

the attorney had incurred fees and expenses during his representation of the appellant, as detailed in an attachment to the application.

On December 3, 1999, the Government filed a motion to dismiss the EAJA application for lack of subject matter jurisdiction. The Government argued that Scarborough had failed to satisfy all of the jurisdictional requirements under the EAJA statute because the application was missing an allegation that the Government's position in the underlying litigation lacked substantial justification. On December 9, 1999, Scarborough responded by filing an amendment to his EAJA application, supplying the previously omitted allegation that the Government's position lacked substantial justification.

The Veterans' Court examined the EAJA statute and held that each of the required parts of an EAJA fee application was a jurisdictional requirement that must be met within the thirty-day filing period, including the requirement that the applicant allege that the Government's position is "not substantially justified." See 28 U.S.C. § 2412(d)(1)(B) (2000). The Veterans' Court then dismissed Scarborough's EAJA application for lack of subject matter jurisdiction based on Scarborough's failure to allege, within the thirty-day filing period, that the Government's position was not substantially justified. Id. This appeal followed. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

A. Standard of Review

In reviewing decisions of the Veterans' Court, this court "shall decide all relevant questions of law, including

interpreting . . . statutory provisions." 38 U.S.C. § 7292(d)(1) (2000); Forshey v. Principi, 284 F.3d 1335, 1351-52 (Fed. Cir. 2002) (en banc). This court reviews an interpretation of statutory provisions by the Veterans' Court without deference. Jones v. Brown, 41 F.3d 634, 637 (Fed. Cir. 1994).

B. Analysis

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." Ardestani v. INS, 502 U.S. 129, 137 (1991). Such a waiver "must be strictly construed in favor of the United States," id., and "not enlarged beyond what the language requires." United States v. Nordic Vill., 503 U.S. 30, 34 (1992) (citation omitted). Once the government provides the waiver, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941). We must, however, take care not to "assume the authority to narrow the waiver that Congress intended." United States v. Kubrick, 444 U.S. 111, 118 (1979).

In this case, the terms of the waiver are contained in the EAJA statute. That statute specifies that an applicant for an award of fees "shall," within thirty days of final judgment in the action, submit an application:

(1) showing that the applicant is a "prevailing party;"
(2) showing that the applicant "is eligible to receive an award;"
(3) showing "the amount sought," together with an itemization in support thereof; and
(4) alleging that the position of the United States "was not substantially justified."

28 U.S.C. § 2412(d)(1)(B) (2000); Singleton v. Apfel, 231 F.3d 853, 857 (11th Cir. 2000). The specific provision of the EAJA at the heart of this case states that:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (2000).

"[T]he starting point in every case involving construction of a statute is the language itself." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977). We first examine the language to determine the plain meaning of the words used by Congress. Bazalo v. West, 150 F.3d 1380, 1382 (Fed. Cir. 1998). In the absence of a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "If the statute is clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." Sullivan v. Stroop, 496 U.S. 478, 482 (1990) (citation omitted). However, "where the text itself does not clearly exclude alternate interpretations, we look

first to the legislative history for illumination of the intent of Congress." Deluxe Corp. v. United States, 885 F.2d 848, 850 (Fed. Cir. 1989) (citing Shriners Hosps. v. United States, 862 F.2d 1561, 1563 (Fed. Cir. 1988)).

Here, the EAJA specifies that a party seeking an award of fees shall submit an application within the thirty-day time limit. 28 U.S.C. § 2412(d)(1)(B). The application must include each of the four requirements set forth in the statute. Id. The same mandatory language ("shall") is used with respect to the thirty-day time limit and the other four requirements that make up the application. Id. This court and five other U.S. Courts of Appeals have characterized the thirty-day time limit for submitting a fee application under the EAJA as jurisdictional in nature. See Bazalo, 150 F.3d at 1383; J.M.T. Mach. Co. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987); see also Yang v. Shalala, 22 F.3d 213, 215 n.4 (9th Cir. 1994); Newsome v. Shalala, 8 F.3d 775, 777 (11th Cir. 1993); Damato v. Sullivan, 945 F.2d 982, 986 (7th Cir. 1991); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1991); Peters v. Sec'y of HHS, 934 F.2d 693, 694 (6th Cir. 1991).

The issue in this appeal is whether the fourth requirement of the EAJA statute, that "the party shall also allege that the position of the United States was not substantially justified," must be satisfied within the thirty-day period or may be satisfied at some later time and relate back to the timely filing of an incomplete application. The general question of whether the individual requirements of the EAJA statute are jurisdictional and must be satisfied within the thirty-day period was addressed in a number of cases decided by other Courts of Appeals and by this court in Bazalo. The Third Circuit in Dunn v. United States, 775 F.2d 99 (3d Cir. 1985), found that a failure to itemize the amount sought under the

EAJA may be corrected after the thirty-day time limit if no prejudice to the Government arises. Id. at 103. In a class action suit against several federal agencies involving radiation contamination by a uranium processing site, Dunn and the other named plaintiffs submitted an EAJA application that made the proper allegations that plaintiffs were prevailing parties and were eligible to receive a fee award, and that the position of the United States was not substantially justified. Id. at 100-01. However, the application failed to state the amount sought or to include an itemized statement of the actual time expended and the rate at which the expenses were computed. Id. at 101. The court held that as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced by the defect. Id. at 104.

The majority opinion in Dunn in effect cleaved § 2412(d)(1)(B) into two distinct components, a filing deadline and a standard for pleading:

> Requiring the filing of a fee claim (or any other) with the court . . . serves the purpose of establishing a means certain for proving compliance with a time bar. Such certainty is required in most situations in the interest of finality and reliance. But once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied. What remains is the fleshing out of the details . . . .

Dunn, 775 F.2d at 103-04.

The Eleventh Circuit in Singleton adopted the reasoning

of Dunn and likewise found that an EAJA application may be supplemented after the thirty-day time limit to satisfy the requirements regarding net worth and the Government's position being "not substantially justified." Singleton, 231 F.3d at 858. The class action plaintiffs in Singleton challenged a policy of the Social Security Administration ("SSA") involving payment of retroactive disability benefits in "random" fashion, resulting in the loss of Medicaid benefits for plaintiffs in certain states. Id. at 854. After the SSA reversed its policy and the court remanded for a determination of retroactive benefits due, the plaintiffs filed an application under the EAJA which arguably failed to allege that the plaintiffs met the net worth requirement and that the United States' position in the district court was not substantially justified. Id. at 855, 857. The court found that a timely EAJA fee application may be supplemented to meet the requirements of § 2412(d)(1)(B), but that district courts may "order rapid completion of the application or outright deny a request to supplement if the government would be prejudiced." Id. at 858. The court in Singleton stated:

> While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that "strict compliance with the pleading requirements must be accomplished within the same time as filing."

Id. (quoting Dunn, 775 F.2d at 103).

Both Singleton and Dunn venture beyond the plain language of the EAJA statute to consider underlying interests in finality and reliance as well as the legislative history. See id.; Dunn, 775 F.2d at 103-04. However, the legislative history, as cited by these cases, is not very enlightening. See

Singleton, 231 F.3d at 858 ("While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that 'strict compliance with the pleading requirements must be accomplished within the same time as filing.'" (quoting Dunn, 775 F.2d at 103) (emphasis added)).

We read the plain language of the EAJA statute to require not only that an application be filed by the thirty-day deadline, but that it contain averments addressing each of the four other requirements enumerated in the statute. 28 U.S.C. § 2412(d)(1)(B) (2000). Use in the statute of the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements indicates that all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction. While we interpret the statute to require that the application address each of the requirements of the EAJA within the thirty-day period, the statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected. When the application completely fails to address one of the four statutory requirements by the thirty-day deadline, however, more than a "fleshing out of the details" remains and the application will be jurisdictionally defective.

In Bazalo, we held that the applicant satisfied the jurisdictional eligibility requirement by asserting he was a prevailing "party" entitled to an award in his EAJA application. 150 F.3d at 1383. Because his initial application satisfied the jurisdictional eligibility requirement, as well as all of the other jurisdictional requirements, this court gave Bazalo some latitude to supplement his application to flesh out the missing details of his net worth. Id. at 1383-84. Citing Dunn, the

opinion in Bazalo stated that "[w]e agree with the Third Circuit that while the time limitation should be strictly met, the content of the EAJA application should be accorded some flexibility." Id. at 1383.

In contrast to Dunn and Singleton, this court, in Bazalo, recognized that the EAJA statute contains "jurisdictional prerequisites" (plural). Id. at 1384 (emphasis added). We initially distinguished a "requirement" of the EAJA from a "jurisdictional prerequisite," and quoted Dunn's explication of the finality and reliance justifications for making such a distinction. Id. at 1383. However, we stopped short of adopting the holding of Dunn, instead both recognizing and analyzing as "jurisdictional requirements" and "jurisdictional prerequisites" each of the provisions of the fee application specified by the plain language of the EAJA and at the same time according fee applicants some latitude to provide details where a required averment may be less than fully explicated. Id. at 1383-84.

After enumerating the contents of Bazalo's EAJA application, including each of the four requirements of § 2412(d)(1)(B), we began our analysis by acknowledging that Bazalo had timely "met the jurisdictional requirements of the EAJA statute" and concluded by reiterating "that Bazalo's application of attorney fees and expenses met the jurisdictional prerequisites of the EAJA statute." Id. at 1383-84 (emphasis added). The requirements of the EAJA statute were recognized to include a showing that the applicant was a prevailing party, a showing that the applicant was eligible for an award, an allegation that the position of the United States was not substantially justified, and an itemized statement of fees sought. Id. The eligibility requirement, the details of which were initially lacking, was both identified as a "jurisdictional

requirement" and found to have been met by Bazalo in his initial application. Id. What was left was simply a fleshing out of the details of his net worth.

Although this court has characterized the four requirements of an EAJA application to be jurisdictional, we have recognized that details relating to the requirements may be "fleshed out" after the thirty-day deadline in certain circumstances. In this case, Scarborough argues that the fourth requirement itself--the allegation of a lack of substantial justification--should be considered separately from the other requirements and need not be alleged at all before the deadline. In accordance with the Supreme Court's remand of the present case for further review in light of Edelman, we reconsider whether the failure to comply with the requirement to allege lack of substantial justification within the thirty-day deadline is fatal to an EAJA application, or whether the applicant is permitted to supplement his application to include the missing allegation after the deadline and to have it relate back to the timely filed, but incomplete, original application.

The Edelman case did not involve an EAJA application, but rather a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 ("Civil Rights Act"). After being denied academic tenure at Lynchburg College, Mr. Edelman timely filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging gender-based discrimination, exacerbated by discrimination on the basis of national origin and religion. Section 706(b) of the Civil Rights Act requires charges to "be in writing under oath or affirmation . . . containing such information and . . . in such form as the Commission requires." Id. § 2000e-5(b). Section 706(e)(1) provides that "a charge shall be filed within one hundred and eighty [or in some cases, three hundred] days after the alleged

unlawful employment practice occurred." Id. § 2000e-5(e)(1). Although Mr. Edelman's charge initially did not include an oath or affirmation, he supplemented his original submission by filing a verified form approximately two weeks after the deadline. The district court dismissed the case, concluding that because Mr. Edelman's initial filing did not include an oath, it was not a "charge" under section 706 and the late-filed verified form could not relate back to and provide Mr. Edelman with a timely filing date. The Court of Appeals for the Fourth Circuit affirmed, interpreting sections 706(b) and 706(e)(1) of the Civil Rights Act in tandem to require that the charge must be verified within the specified time period. The Supreme Court disagreed.

In reversing the decision of the district and appellate courts, the Supreme Court reasoned that the purposes behind the verification requirement and the timeliness requirement were quite different. 122 S. Ct. at 1149. The Court held that while the timeliness requirement encourages prompt filing of claims and speedy resolution of discriminatory behavior, the verification requirement protects employers from frivolous claims. Id. The Court analogized the situation in the Edelman case to Becker v. Montgomery, 532 U.S. 757 (2001), in which the Supreme Court held that "while the timing and content requirements [for filing a notice of appeal under Rule 3 of the Federal Rules of Appellate Procedure] were 'jurisdictional in nature,' nothing prevented later cure of the [Rule 11 of the Federal Rules of Civil Procedure] signature defect." Edelman, 122 S. Ct. at 1151 (citing Becker, 532 U.S. at 765). The Court noted that both the verification requirement of Edelman and the signature requirement of Becker were aimed at stemming irresponsible litigation, and as such, concluded that it is not unreasonable to permit relation-back of a late-filed oath or signature to a timely-filed complaint or charge. Edelman, 122

S. Ct. at 1151.

The present case is distinguishable from Edelman and Becker. First, the statute at issue in Edelman is "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." Id. at 1150 (quoting EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988)). Edelman's permissive relation back of the verification requirement "ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently." Id.[1] The EAJA statute, however, is directed to attorneys seeking attorney fees. As such, this paternalistic protection is not required.

Second, the two requirements in Edelman--namely the timely filing of the charge and the verification--are contained in separate statutory provisions held not interdependent. 42 U.S.C. § 2000e-5(b); id. § 2000e-5(e)(1). Similarly, in Becker, the Supreme Court differentiated between the content and timing of a notice of appeal on the one hand and the signature requirement on the other, and noted that they are found in separate rules. Fed. R. App. P. 3(a)(1) (requiring that a notice of appeal be filed within thirty days); Fed. R. App. P. 3(c)(1) (listing the content requirements of a notice of appeal); Fed. R. Civ. P. 11(a) (requiring that every filing bear the signature of an attorney of record or the party, if unrepresented). Because

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[1]The dissent implies that requiring statutory compliance of the attorneys seeking attorney fees under EAJA would deter the vindication of one's rights. However, the goal of EAJA, to encourage claims against improper government action, is not and should not be dependent upon relaxed standards of statutory compliance coming not at the beginning of the process, but after the fact.

the verification and signature requirements are not present in the same statutory provisions and their purposes are different, the Court divorced these requirements from the timeliness requirement in each case. See, e.g., Becker, 532 U.S. at 766 ("[A] signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional.") In the present case, the situation is antithetical. The allegation of lack of substantial justification is part of the single statutory provision detailing both the contents required for an EAJA application and the requirement that the application be filed within thirty days. Moreover, the allegation of a lack of substantial justification is not a pro forma requirement, but rather requires an applicant to analyze the case record. 28 U.S.C. § 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record . . . .").

Third, the purpose of the fourth requirement of an EAJA application is not different than the other three requirements, unlike the verification of Edelman or the signature of Becker. The allegation that the government was not substantially justified is not simply a tool to weed out frivolous claims, but rather is one portion of the basis of the award itself. See, e.g., Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 165 (1990) ("The 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation."). Jean thus informs the jurisdictional nature of the allegation of a lack of substantial justification in describing that it "operates as a one-time threshold for fee eligibility." Id. at 160. After satisfying the four requirements of the EAJA application, only then does the court have jurisdiction to determine what fee

award is reasonable. Id. at 160-61.

The legislative history tags the lack of substantial justification allegation as a burden-shifting statute. S. Rep. No. 96-974, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4726, 4989 (stating that the allegation is intended "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified"). This, however, is belied by the plain language of the EAJA statute itself:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). Whether or not the allegation is made, the burden is always on the United States to assert the defense that it was substantially justified if it seeks to avoid an award of fees to the prevailing party. The brief commentary on burden-shifting in the legislative history is not helpful given the plain language of the statute itself.

For the reasons set forth above, we conclude that the allegation of a lack of substantial justification is a jurisdictional requirement of the EAJA statute that must be met within the specified thirty-day time period. To allow otherwise is contrary to the strict construction of the language of the statute required in cases of waiver of sovereign immunity. The averment is a

substantive requirement that is not so easily divorced from the remaining requirements and accompanying thirty-day deadline, both set forth in the same statutory provision. Moreover the purpose of the allegation is the same as for the other three requirements--to provide a threshold for fee determination. For these reasons, the allegation of a lack of substantial justification is more akin to insufficient content than the lacking signature in Becker. Edelman, 122 S. Ct. at 1151 ("We held that while the timing and content requirements for the notice of appeal were 'jurisdictional in nature,' nothing prevented later cure of the signature defect." (citing Becker, 532 U.S. at 765) (emphasis added)).

Because the allegation of no substantial justification is a jurisdictional requirement, the remaining question is whether the failure to so allege is fatal to an EAJA application. In this respect, this case is analogous to Smith v. Barry, 502 U.S. 244 (1992), and Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres, a notice of appeal in an employment discrimination suit omitted the petitioner's name due to a clerical error. The case was remanded by the Ninth Circuit back to the district court, where Oakland moved for partial summary judgment on the ground that the prior judgment was final as to the petitioner by virtue of his failure to appeal. The district court granted the motion and the appeals court affirmed. The Supreme Court granted certiorari to determine whether failure to file a notice of appeal in accordance with Rule 3(c) was a jurisdictional bar to the appeal. Fed. R. App. P. 3(c). In affirming the lower courts, the Supreme Court noted that the "failure to name a party in a notice of appeal is more than an excusable 'informality.'" Torres, 487 U.S. at 314. Moreover, the Court stated that "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional

threshold." Id. at 315-16. The Court had previously held that the filing requirements of Rule 3 were jurisdictional, based on a plain reading of the rule and the purpose as a threshold to appeal. See, e.g., United States v. Robinson, 361 U.S. 220, 224 (1960) (cited by Torres, 487 U.S. at 315).

Similarly, Scarborough's failure to allege a lack of substantial justification is not "an excusable informality" nor is it "imperfect but substantial compliance." Scarborough's application was instead completely devoid of a jurisdictional requirement. The required allegation of lack of substantial justification calls for substantive content, similar to the content requirements contemplated in Rule 3(c). This notion is further supported by the Smith case.

In Smith, the named appellant appealed a district court's dismissal of his action against Barry under 42 U.S.C. § 1983. While a motion for judgment as a matter of law was pending, Smith filed a premature notice of appeal. After a ruling on the motion for judgment as a matter of law, Smith filed an informal appeal brief within the deadline for filing a notice of appeal. The Court of Appeals for the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, holding that the notice of appeal was premature and that the informal brief was not a functional equivalent of the notice of appeal as required by Rule 3. Fed. R. App. P. 3(c). The Supreme Court granted certiorari to determine whether an appellate brief may serve as a notice of appeal. In remanding the case to the Court of Appeals to determine whether the informal brief included sufficient information as required by Rule 3(c), the Supreme Court cited Torres and concluded that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review," and further noted that "noncompliance is fatal to an appeal." Smith, 502 U.S. at 248.

The present case is not an instance of substantial compliance with a technical requirement, but rather, absolute noncompliance with a jurisdictional threshold. Noncompliance is fatal. Scarborough is not seeking to merely "flesh out the details" of an otherwise complete application. Rather, he is seeking to add an entirely missing averment that is a jurisdictional requirement. Because he sought to add this averment after the expiration of the thirty-day deadline, his attempt to remedy the jurisdictional defect was untimely.

CONCLUSION

For the foregoing reasons, the dismissal by the Veterans' Court of Scarborough's EAJA application for attorney fees and expenses for lack of subject matter jurisdiction is AFFIRMED.

United States Court of Appeals for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellee.

MAYER, Chief Judge, dissenting.

Because I believe that: (1) Edelman v. Lynchburg College, 535 U.S. 106 (2002), implies that failure to timely include a simple allegation that does not prejudice the opposing party, may relate back to a timely filed application; (2) the court unnecessarily narrows the waiver that Congress intended because the statutory language of the Equal Access to Justice Act ("EAJA") does not mandate strict compliance or foreclose supplementation; and (3) Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998), controls the outcome of this case, I dissent.

The "no substantial justification" allegation in the EAJA application is akin to the verification requirement of Edelman and the signature requirement of Becker v. Montgomery, 532 U.S. 757 (2001). The Court noted in those cases, respectively, that both the verification and signature requirements are aimed at stemming irresponsible litigation. Similarly, the no substantial justification allegation of EAJA serves a public

policy function; it is a burden-shifting mechanism to offset deterrents to contesting government action. The legislative history pointedly reveals that this simple allegation was included "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified . . . ." S. Rep. No. 96-974, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4726, 4992. Congress recognized that this standard struck a balance between the executive branch's duty to observe that the laws are faithfully executed and the public interest in encouraging parties to vindicate their rights. Id. at 4989. The legislative history further explains that the standard was implemented because it is easier for the government, controller of the evidence, to establish the reasonableness of its action versus a private party. Id. Moreover, failure to include the simple allegation within the thirty-day time period does not prejudice the government's response to the application. And the applicant need not marshal the facts to determine if the government's position was substantially justified. Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 160 (1990) ("Moreover, the 1985 amendment to § 2412(d)(1)(B) directs a court to determine whether the Government's past position was substantially justified 'on the basis of the record . . . .'" (Pub. L. No. 99-80, 99 Stat. 184-185, § 2(b) (codified as amended at 28 U.S.C. § 2412(d)(1)(B)))).

The objective of EAJA is to eliminate the financial disincentive for those who would defend against unjustified governmental action and thereby deter it. Jean, 496 U.S. at 163. In light of this and Bazalo, Becker, and Edelman, it is apparent that Congress did not intend the EAJA application process to be an additional deterrent to the vindication of rights because of a missing averment.

EAJA is a waiver of sovereign immunity and therefore must be strictly construed. But we must take care not to "assume the authority to narrow the waiver that Congress intended." United States v. Kubrick, 444 U.S. 111, 118 (1979). By holding that failure to include the "no substantial justification" allegation within the thirty-day filing requirement is an incurable jurisdictional requirement, the court indulges an "unduly restrictive" reading of the congressional waiver of sovereign immunity, Bowen v. City of New York, 476 U.S. 467, 479 (1986), rather than "a realistic assessment of legislative intent," Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990). In my view this is substantially the same case as Bazalo, which I would follow.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1590

Randall C. Scarborough,
Appellant,

v.

Togo D. West, Jr.,
Secretary of Veterans Affairs,
Appellee.

Before KRAMER, HOLDAWAY, and GREENE, Judges.

ORDER

Before the Court is the appellant's application, through counsel, for attorney fees and expenses in the amount of $19,333.75, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Secretary has filed a motion to dismiss for lack of jurisdiction, and the appellant has filed a response to the Secretary's motion. For the reason that follows, the Court will dismiss the appellant's application.

In the underlying litigation, the appellant appealed a July 1998 decision of the Board of Veterans' Appeals (Board), which determined, inter alia, that a March 1976 regional office (RO) decision, which had denied entitlement to service connection for chronic renal failure on the basis that the condition preexisted service, contained no clear and unmistakable error (CUE). In a July 9, 1999, order, this Court vacated the decision and remanded the matter on the basis that

both the 1976 RO decision and the Board decision failed to address the effect of the law existing at the time of the RO decision regarding the presumption of sound condition.

The appellant, through his counsel, submitted a premature EAJA application (App.) on August 19, 1999, which was filed on October 4, 1999, after entry of mandate in this case. In his application, the appellant stated that: (1) he was the prevailing party pursuant to the July 1999 remand order, (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4) the attorney had incurred fees and expenses during his representation of the appellant, which were enumerated in an attachment to the application. App. at 1-2, Attachment. On December 3, 1999, the Secretary filed a motion to dismiss for lack of jurisdiction on the basis that the appellant failed to allege that VA's position lacked substantial justification. In response, on December 9, 1999, 112 days after submission of his application and 66 days after the filing of the application, the appellant filed an amendment to his EAJA application, in which he alleged that VA's position lacked substantial justification.

The Court has jurisdiction to award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F), as amended by section 506 of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 506, 106 Stat. 4506, 4513 (1992). In order to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. § 2412(d)(1)(B). In addition, in order to satisfy jurisdictional requirements, the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the

Secretary was not substantially justified. See 28 U.S.C. § 2412(d)(1)(A) and (B); *Chesser v. West*, 11 Vet. App. 497, 499 (1998); *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996) (en banc), *rev'd on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998). Although not a jurisdictional requirement, to be a party eligible for an EAJA award, an individual must show that his or her net worth did not exceed $2,000,000.00 at the time the civil action was filed. See 28 U.S.C. § 2412(d)(2)(B); *Bazalo*, 150 F.3d at 1383-84.

Contrary to the contention of the appellant, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has not held that " the requirement to file [an EAJA application] within 30 days [is] clearly jurisdictional, but the other requirements of the statute [are] not." Appellant's Response (Resp.) at 1. As indicated above, this Court specifically held in *Bazalo v. Brown* that, inter alia, the requirement that an applicant must allege, within the requisite 30-day time period, that VA's actions lacked substantial justification is jurisdictional, and that an applicant may not amend a jurisdictionally defective application outside of that 30-day filing period. See 28 U.S.C. § 2412(d)(1)(B); *Bazalo*, 9 Vet.App. at 308-09. On appeal, the Federal Circuit left intact the holding of the Court on the substantial justification question, addressing solely the question whether a timely filed EAJA application may be supplemented after the expiration of the 30-day period for filing set forth in section 2412(d)(1)(B) to show eligibility by establishing that the applicant met the net worth requirement of section 2412(d)(2)(B). *See Bazalo v. West*, 150 F.3d at 1384 (holding, where application alleged position of VA lacked substantial justification and stated that applicant was "a prevailing party and entitled to receive an award," that application could be supplemented outside 30-day filing period to show that net worth requirement met if

Government not prejudiced thereby). Indeed, the Federal Circuit implicitly upheld this Court's ruling that an allegation of substantial justification within the requisite 30-day period is jurisdictional when it stated that Mr. Bazalo, who had specifically alleged a lack of substantial justification in his original, timely, fee application, "met the jurisdictional requirements" of the EAJA statute. *Id.; see also Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) (a "fee application must contain an allegation 'that the position of the United States was not substantially justified'"). Accordingly, the application filed by the appellant within the 30-day filing period, which contained no mention whatsoever regarding substantial justification, is jurisdictionally deficient. The amendment alleging a lack of substantial justification, filed well outside of the requisite 30-day period, cannot correct such a jurisdictional deficit, *see Bazalo v. Brown*, 9 Vet.App. at 308-09, and the Court therefore lacks jurisdiction over the appellant's EAJA application.

On consideration of the above, it is

ORDERED that the appellant's application for an award of attorney fees and expenses under the EAJA is DISMISSED for lack of jurisdiction.

DATED: June 14, 2000 PER CURIAM.

United States Court of Appeals
for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

DECIDED: December 10, 2001

Before MAYER, Chief Judge, RADER, and LINN, Circuit Judges.

LINN, Circuit Judge.

Randall C. Scarborough appeals from a dismissal by the United States Court of Appeals for Veterans Claims ("Court of Veterans Claims") for lack of subject matter jurisdiction over his application for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1994). We hold that an application for attorney fees and expenses that does not include, prior to expiration of the thirty-day deadline, an allegation that the position of the United States was "not substantially justified" fails to meet the jurisdictional prerequisites of the EAJA statute. Because Scarborough's

initial application failed to comply with the statute, and the Court of Veterans Claims correctly determined that it was without jurisdiction to consider his application, this court affirms.

BACKGROUND

Upon prevailing in the underlying litigation, Scarborough submitted prematurely (before the entry of the mandate in his case) an application for attorney fees and expenses under the EAJA, 28 U.S.C. § 2412(d). On October 4, 1999, following the issuance of the mandate, the clerk filed Scarborough's EAJA application which stated that: (1) he was the prevailing party pursuant to the July 1999 remand order; (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4) the attorney had incurred fees and expenses during his representation of the appellant, which were enumerated in an attachment to the application. On December 3, 1999, the Government filed a motion to dismiss the EAJA application for lack of subject matter jurisdiction. The Government argued that Scarborough had failed to satisfy the jurisdictional requirements under the EAJA statute because he did not allege in his EAJA application that the Governments position in the underlying litigation lacked substantial justification. Scarborough filed an amendment to his EAJA application on December 9, 1999. In that amendment he alleged that the Government's position lacked substantial justification.

The Court of Veterans Claims examined the EAJA statute and held that it contains several jurisdictional requirements that must be met within the thirty-day filing period, including the requirement that the applicant allege that

the Government's position is "not substantially justified." See 28 U.S.C. § 2412(d)(1)(B) (1994).

The Court of Veterans Claims then dismissed Scarborough's EAJA application for lack of subject matter jurisdiction because it found that Scarborough did not allege, within the thirty-day filing period, that the Governments position was not substantially justified. Id. Scarborough timely appealed to this court, and we have jurisdiction over the appeal pursuant to 38 U.S.C. § 7292(c).

DISCUSSION

A. Standard of Review

In reviewing decisions of the Court of Veterans Claims, this court "shall decide all relevant questions of law, including interpreting . . . statutory provisions." 38 U.S.C. § 7292(d)(1) (Supp. V 1999). This court reviews an interpretation of statutory provisions by the Court of Veterans Claims without deference. Jones v. Brown, 41 F.3d 634, 637 (Fed. Cir. 1994).

B. Analysis

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." Ardestani v. INS, 502 U.S. 129, 137 (1991). Such a waiver "must be strictly construed in favor of the United States," id., and "not enlarged beyond what the language requires." United States v. Nordic Vill., 503 U.S. 30, 34 (1992). Once the government provides the waiver, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941).

In this case, the terms of the waiver are contained in the EAJA statute. That statute specifies that an applicant for an award of fees "shall," within thirty days of final judgment in the action, submit an application:

(1) showing that the applicant is a "prevailing party;"
(2) showing that the applicant "is eligible to receive an award;"
(3) showing "the amount sought," together with an itemization in support thereof; and
(4) alleging that the position of the United States "was not substantially justified."

28 U.S.C. § 2412(d)(1)(B) (1994); Singleton v. Apfel, 231 F.3d 853, 857 (11th Cir. 2000). The specific provision of the EAJA at the heart of this case states that,

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses . . . . The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (1994) (emphasis added).

In construing a statute, "the starting point in every case involving construction of a statute is the language itself." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977). We first examine the language to determine the plain meaning of the words used by Congress. Bazalo v. West, 150 F.3d 1380, 1382 (Fed. Cir. 1998). In the absence of a clearly expressed legislative intention to the contrary, the statutory language must

ordinarily be regarded as conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "If the statute is clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." Sullivan v. Stroop, 496 U.S. 478, 482 (1990).

The language of the EAJA statute is plain and unambiguous for the purposes of this appeal. A party seeking an award of fees "shall" submit an application including each of the four requirements enumerated, within the thirty-day time limit. 28 U.S.C. § 2412 (d)(1)(B) (1994). The same mandatory language ("shall") is used with respect to the thirty-day time limit as with the other four requirements, and all four are stated as parts of the necessary application.

This court and five other U.S. Courts of Appeals have characterized the thirty-day time limit for submitting a fee application under the EAJA as jurisdictional in nature. See Bazalo, 150 F.3d at 1383; J.M.T. Mach Co. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987). See also Yang v. Shalala, 22 F.3d 213, 215 n.4 (9th Cir. 1994); Newsome v. Shalala, 8 F.3d 775, 777 (11th Cir. 1993); Damato v. Sullivan, 945 F.2d 982, 986 (7th Cir. 1991); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1991); Peters v. Sec'y of HHS, 934 F.2d 693, 694 (6th Cir. 1991).

The issue in this appeal is whether the other four requirements enumerated in the EAJA statute are likewise jurisdictional. This issue was addressed in a number of cases decided by other Courts of Appeals and by this court in Bazalo. The Third Circuit in Dunn found that a failure to itemize the amount sought under the EAJA may be corrected after the thirty-day time limit if no prejudice to the Government arises.

Dunn v. United States, 775 F.2d 99, 103 (3d Cir. 1985). In a class action suit against several federal agencies involving radiation contamination by a uranium processing site, Dunn and the other named plaintiffs submitted an EAJA application that made the proper allegations that plaintiffs were prevailing parties and were eligible to receive a fee award, and that the position of the United States was not substantially justified. Id. at 100-01. However, the application failed to state the amount sought or to include an itemized statement of the actual time expended and the rate at which the expenses were computed. Id. at 101. The court held that as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced by the defect. Id. at 104.

The majority opinion in Dunn in effect cleaved § 2412(d)(1)(B) into two distinct components: a filing deadline and a standard for pleading:

> Requiring the filing of a fee claim (or any other) with the court . . . serves the purpose of establishing a means certain for proving compliance with a time bar. Such certainty is required in most situations in the interest of finality and reliance. But once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied. What remains is the fleshing out of the details . . .

Dunn, 775 F.2d at 103-04.

The 11th Circuit in Singleton adopted the reasoning of Dunn and likewise found that an EAJA application may be

supplemented after the thirty-day time limit to satisfy the requirements regarding net worth and the Government's position being "not substantially justified." Singleton, 231 F.3d at 858. The class action plaintiffs in Singleton challenged a policy of the Social Security Administration ("SSA") involving payment of retroactive disability benefits in "random" fashion, resulting in the loss of Medicaid benefits for plaintiffs in certain states. Id. at 854. After the SSA reversed its policy and the court remanded for a determination of retroactive benefits due, the plaintiffs filed an application under the EAJA which arguably failed to allege that the plaintiffs met the net worth requirement and that the United States position in the district court was not substantially justified. Id. at 855, 857. The court found that a timely EAJA fee application may be supplemented to meet the requirements of § 2412(d)(1)(B), but that district courts may "order rapid completion of the application or outright deny a request to supplement if the government would be prejudiced." Id. at 858. The court in Singleton stated:

> While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that "strict compliance with the pleading requirement[s] must be accomplished within the same time as filing."

Singleton, 231 F.3d at 858 (quoting Dunn, 775 F.2d at 103).

Both Singleton and Dunn venture beyond the plain language of the EAJA statute to consider underlying interests in finality and reliance as well as the legislative history. See Singleton, 231 F.3d at 858; Dunn, 775 F.2d at 103-04. However persuasive these secondary tools might be, they cannot justify disregarding the plain language of the statute.

The plain language of the EAJA statute requires that an application not only be filed by the thirty-day deadline, but that the application contain averments addressing each of the four other requirements enumerated in the statute. 28 U.S.C. § 2412(d)(1)(B) (1994). Use in the statute of the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements indicates that all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction. While the statute requires that the application address each of the requirements of the EAJA within the thirty-day period, the statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected. When the application completely fails to address one of the four statutory requirements by the thirty-day deadline, however, more than a "fleshing out of the details" remains and the application will be jurisdictionally defective.

Our precedent in Bazalo reflects the plain language of the EAJA discussed above. In Bazalo, we held that the applicant satisfied the jurisdictional eligibility requirement by asserting he was a prevailing "party" entitled to an award in his EAJA application. 150 F.3d at 1383. Because his initial application satisfied the jurisdictional eligibility requirement, as well as all of the other jurisdictional requirements, this court gave Bazalo some latitude to supplement his application to flesh out the missing details of his net worth. Id. at 1383-84. Citing Dunn, the opinion in Bazalo stated that "[w]e agree with the Third Circuit that while the time limitation should be strictly met, the content of the EAJA application should be accorded some flexibility." Id. at 1383.

In contrast to Dunn and Singleton, this court, in Bazalo,

recognized that the EAJA statute contains "jurisdictional prerequisites" (plural). Id. at 1384 (emphasis added). We initially distinguished a "requirement" of the EAJA from a "jurisdictional prerequisite," and quoted Dunn's explication of the finality and reliance justifications for making such a distinction. Id. at 1383. However, we stopped short of adopting the holding of Dunn, instead both recognizing and analyzing as "jurisdictional requirements" and "jurisdictional prerequisites" each of the provisions of the fee application specified by the plain language of the EAJA and at the same time according fee applicants some latitude to provide details where a required averment may be less than fully explicated. Id. at 1383-84.

After enumerating the contents of Bazalo's EAJA application, including each of the four requirements of § 2412(d)(1)(B), we began our analysis by acknowledging that Bazalo had timely "met the jurisdictional requirements of the EAJA statute" and concluded by reiterating "that Bazalo's application for attorney fees and expenses met the jurisdictional prerequisites of the EAJA statute." Id. at 1383-84 (emphasis added). The requirements of the EAJA statute were recognized to include a showing that the applicant was a prevailing party, a showing that the applicant was eligible for an award, an allegation that the position of the United States was not substantially justified, and an itemized statement of the fees sought. Id. at 1383-84. The eligibility requirement, the details of which were initially lacking, was both identified as a "jurisdictional requirement" and found to have been met by Bazalo in his initial application. Id. What was left was simply a fleshing out of the details of his net worth.

In the present case, Scarborough's initial EAJA application was not merely in need of the "fleshing out of the

details" as in Bazalo, but was entirely devoid of the required allegation that the Government's position was "not substantially justified." While Scarborough sought to add the missing averment to his EAJA application in an amendment, he failed to remedy the jurisdictional defect before the expiration of the thirty-day deadline. Because Scarborough's initial application failed to comply with the statute, and his amendment was not timely in correcting the omission, the Court of Veterans Claims correctly determined that it was without jurisdiction to consider his application.

CONCLUSION

Because the Court of Veterans Claims lacked jurisdiction over Scarborough's EAJA application, we affirm.

AFFIRMED

COSTS

No costs.

Supreme Court of the United States

Randall C. SCARBOROUGH,
Petitioner,

v.

Anthony J. PRINCIPI, Secretary of Veterans Affairs.

No. 01-1360.

June 17, 2002.

Case below, 273 F.3d 1087.

On petition for writ of certiorari to the Court of Appeals for the Federal Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Federal Circuit in light of *Edelman v. Lynchburg College*, 535 U.S. ----, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002).

United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 24, 2003.

FOR THE COURT,

s/

Jan Horbaly,
Clerk

Dated: April 17, 2003 [Filed April 17, 2003]

cc: Brian Wolfman
Joseph Trautwein

SCARBOROUGH V DVA, 00-7172
(CVA - 98-1590)

****

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals
for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 4, 2002.

FOR THE COURT,

s/

Jan Horbaly,
Clerk

Dated: February 25, 2002

cc: Brian Wolfman
Joseph Trautwein

SCARBOROUGH V DVA, 00-7172
(CVA - 98-1590)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1590

RANDALL C. SCARBOROUGH, APPELLANT,

V.

TODD D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 29(i), this action may not be cited as precedent.

The appellant appeals a July 6, 1998, decision of the Board of Veterans' Appeals (Board or BVA) finding no clear and unmistakable error (CUE) in a March 25, 1976, rating decision that denied entitlement to service connection for chronic renal failure (claim 1), and denying an effective date earlier than April 21, 1993, for an award of service connection (and a 100% evaluation) for end stage renal disease (claim 2). Single-judge disposition is appropriate when, as here, the issue is of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Because the appellant's arguments pertain only to claim 1, any appeal as to claim 2 is deemed abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (citing *Bucklinger v.*

Brown, 5 Vet.App. 435, 436 (1993)).

Under 38 C.F.R. § 3.105(a) (1997), a prior decision must be reversed or amended where evidence establishes CUE. For CUE to exist:

> (1) "[e]ither the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied," (2) the error must be "undebatable" and of the sort "which, had it not been made, would have manifestly changed the outcome at the time it was made," and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question.

Damrel v. Brown, 6 Vet.App. 242, 245 (1994) (quoting *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc)). On appeal of a BVA determination that there was no CUE in a prior final RO decision, the Court's review is limited to determining whether the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261 (a)(3)(A), and whether the Board provided an adequate statement of reasons or bases for its denial of CUE. *See Eddy v. Brown*, 9 Vet.App. 52, 57 (1996); *Russell*, 3 Vet.App. at 315.

The Court has reviewed the record on appeal and the filings of the parties. Both the 1976 regional office (RO) decision, to the extent it determined that the appellant's chronic renal failure preexisted service, and the BVA decision, which determined that there was no CUE in such decision (as well as

the Secretary in his brief) failed to address (as raised by the appellant below (R. at 315)), the effect of the law as it existed at the time of the RO's 1976 adjudication, namely the presumption of sound condition. *See* Appellant's Reply Brief at 2. Accordingly, the Court concludes that the Board's decision is not supported by an adequate statement of reasons or bases and must be vacated. *See Eddy* and *Russell*, both *supra*. On remand, the BVA shall address such failure in the 1976 decision and its effect on the appellant's CUe claim. In doing so the BVA shall consider all the evidence of record at the time of the 1976 RO decision, not simply "an item of evidence" (R. at 12) supporting the government's position. Moreover, with respect to the latter, the BVA shall address in its determination, the significance of the lack of any signatures on the reports by the medical and physical evaluation boards. R. at 99-102, 106. Assuming that the BVA determines that any such failure is not outcome determinative, it shall then address, providing adequate reasons or bases, whether there was CUE in the 1976 RO decision insofar as it did not award service connection based upon aggravation. In this regard, the Board shall compare the appellant's disability at the time of entry into the service with his disability at discharge and provide reasons or bases as to whether, under the statutory and regulatory aggravation provisions extant at the time of the 1976 RO decision, there was an increase in disability during service, *see* Appellant's Reply Br. at 4 ("the Government... equated a temporary kidney condition, which was resolved prior to entry, to kidney failure after entry"), and if so, address under such law, the significance of the RO's failure to find that any such increase was due to the disease's natural progress.

On consideration of the foregoing, it is

ORDERED that the July 6, 1998, BVA decision is VACATED and the matter is REMANDED for further proceedings consistent with this order.

DATED: JUL -9 1999

BY THE COURT:

s/
KENNETH B. KRAMER
Judge

(2)

JUL 14 2003

No. 02-1657

In the Supreme Court of the United States

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
WILLIAM KANTER
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

26 pp

QUESTIONS PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), provides that "[a] party seeking an award of fees * * * shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified." The question is as follows:

Whether a complete application containing each of those elements, including an allegation that the government's position was not substantially justified, must be filed within thirty days to confer jurisdiction on the court.

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In the Supreme Court of the United States

No. 02-1657

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 319 F.3d 1346. The order of this Court (Pet. App. 36a) vacating and remanding an earlier decision of the court of appeals is reported at 536 U.S. 920. The earlier opinion of the court of appeals (Pet. App. 26a-35a) is reported at 273 F.3d 1087. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 22a-25a) is reported at 13 Vet. App. 530.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. A petition for rehearing was denied on April 17, 2003 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on May 9, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access to Justice Act (EAJA) authorizes a court to award fees to prevailing parties in certain litigation against the United States, unless the position of the United States is found to be substantially justified:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A).

As a prerequisite to obtaining an award of fees under EAJA, a party must file an application containing certain information within thirty days of the court's final judgment:

> A party seeking an award of fees * * * shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412(d)(1)(B).

2. Petitioner sought review of a decision made by the Board of Veterans' Appeals that found no clear and unmistakable error in a 1976 determination that petitioner's disability lacked a service connection. Pet. App. 22a. The United States Court of Appeals for Veterans Claims vacated and remanded the Board's decision (*ibid.*), and, on remand, petitioner was awarded retroactive benefits. Petitioner prematurely filed an application for attorney's fees under EAJA with the Court of Appeals for Veterans Claims, which was held and treated as filed on October 4, 1999, following the issuance of the court's mandate. See *Id.* at 23a. Petitioner's application stated that petitioner "was the prevailing party pursuant to the July 1999 remand order" and that "his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA." *Id.* at 2a. The application also included an enumeration of the fees and expenses incurred by his attorney in representing him. *Id.* at 3a. The application did not, however, allege that the government's position in the underlying litigation lacked substantial justification. *Ibid.* On December 3, 1999, the government moved to dismiss the application for lack of subject matter jurisdiction for failure to allege a lack of substantial justification in the government's position. *Ibid.*

3. The Court of Appeals for Veterans Claims (CAVC) dismissed petitioner's application. Pet. App.

22a-25a. The court held that "to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. 2412(d)(1)(B)" and that "in order to satisfy jurisdictional requirements, the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the Secretary was not substantially justified." *Id.* at 23a-24a. Because petitioner's application contained no allegation that the government's position lacked substantial justification, the court found that it "lack[ed] jurisdiction over the * * * EAJA application." *Id.* at 25a.

4. The Federal Circuit affirmed. Pet. App. 26a-35a. The court read the language in EAJA to be "plain and unambiguous" in requiring "[a] party seeking an award of fees [to] submit an application including each of the four requirements enumerated, within the thirty-day time limit." *Id.* at 30a. The court acknowledged that the Third Circuit had held, in *Dunn* v. *United States*, 775 F.2d 99, 104 (1985), that "as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced." Pet. App. 31a. Likewise, the court acknowledged that the Eleventh Circuit had reached a similar result in *Singleton* v. *Apfel*, 231 F.3d 853 (2000). Pet. App. 31a-32a. The court explained, however, that those decisions "venture[d] beyond the plain language of the EAJA." *Id.* at 32a.

The court of appeals nonetheless recognized that the "statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out

or corrected." Pet. App. 33a. It is only "[w]hen the application completely fails to address one of the four statutory requirements by the thirty-day deadline" that the "application will be jurisdictionally defective." *Ibid.* The court accordingly held that it lacked jurisdiction over petitioner's application because it "was not merely in need of the 'fleshing out of the details' * * * but was entirely devoid of the required allegation that the Government's position was 'not substantially justified.'" *Id.* at 34a-35a.

5. On petition for certiorari, this Court granted the petition, vacated the judgment, and "remanded to the * * * Federal Circuit in light of *Edelman* v. *Lynchburg College*, [535 U.S. 106 (2002)]." Pet. App. 36a. In *Edelman*, this Court held that a Title VII discrimination charge can be supplemented to include the oath or affirmation required by 42 U.S.C. 2000e-5(b) after the filing deadline under 42 U.S.C. 2000e-5(e)(1) has passed.

6. On remand, a divided panel of the Federal Circuit affirmed. Pet. App. 1a-18a. The court reiterated its disagreement with the Third and Eleventh Circuits. *Id.* at 6a-11a. It then addressed this Court's *Edelman* decision, finding it not controlling for three reasons. First, the court reasoned that "the statute at issue in *Edelman*," Title VII, "is 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" *Id.* at 13a (quoting *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (citation omitted)). By contrast, the "EAJA statute * * * is directed to attorneys seeking attorney fees" and thus "paternalistic protection" against inadvertent forfeiture of rights "is not required." *Ibid.*

Second, the court explained that "the two requirements in *Edelman*—namely the timely filing of the charge and the verification—are contained in separate

statutory provisions." Pet. App. 13a (citing 42 U.S.C. 2000e-5(b) and 5(e)(1)). In the EAJA, however, the "allegation of lack of substantial justification is part of the single statutory provision detailing both the contents required for an EAJA application and the requirement that the application be filed within thirty days." *Id.* at 14a.

Third, the court found that the purposes of the substantial justification allegation are different from the purpose of the verification requirement at issue in *Edelman*. The verification requirement is "aimed at stemming irresponsible litigation, and as such * * * it is not unreasonable to permit relation-back of a late-filed oath." Pet. App. 12a (citing *Edelman*, 535 U.S. at 116). The substantial justification allegation, on the other hand, "is not simply a tool to weed out frivolous claims, but rather is one portion of the basis of the award itself." *Id.* at 14a. In this regard, the court of appeals observed that this Court described the substantial justification requirement as "'operat[ing] as a one-time threshold for fee eligibility.'" *Ibid.* (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160 (1990)).

Accordingly, the court concluded that an allegation of a lack of substantial justification "is more akin" to the requirements for the contents of a notice of appeal that may not be cured after the deadline, than to the signature requirement that may be satisfied after the fact under *Becker* v. *Montgomery*, 532 U.S. 757 (2001). Pet. App. 16a. In this regard, the court observed that the statutory EAJA content requirements "'are jurisdictional in nature, and their satisfaction is a prerequisite'" to conferring jurisdiction on a court to award fees. *Id.* at 17a (quoting *Smith* v. *Barry*, 502 U.S. 244, 248 (1992)). In sum, only "[a]fter satisfying the four requirements of the EAJA application * * * does the court have jurisdiction to determine what fee award is reasonable." *Id.* at 14a-15a (citing *Jean*, 496 U.S. at 160-161).

Chief Judge Mayer dissented. Pet. App. 19a-21a. In his view, "[t]he 'no substantial justification' allegation in the EAJA application is akin to the verification requirement of *Edelman* and the signature requirement of *Becker v. Montgomery*, 532 U.S. 757 (2001)." *Id.* at 19a.

ARGUMENT

1. The Federal Circuit correctly held that under the plain language of EAJA, a timely filed fee application must include an allegation that the government's position in the underlying proceeding was not substantially justified. The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States (see, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)) and not enlarged beyond what the language requires (*United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)). If the government consents to an action, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

EAJA provides:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement * * *. The

party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412(d)(1)(B). Section 2412(d)(1)(B) thus requires that an application must be filed within thirty days of final judgment and must include (1) a showing that the applicant is a prevailing party; (2) a showing that the applicant is eligible to receive an award, *i.e.*, that the applicant's net worth "did not exceed $2,000,000 at the time the civil action was filed," 28 U.S.C. 2412(d)(2)(B); (3) the amount sought, with an itemization of time expended; and (4) an allegation that the government's position was not substantially justified.

As the court of appeals held, the Act's "plain language * * * require[s] not only that an application be filed by the thirty-day deadline, but that it contain averments addressing each of the four * * * requirements enumerated in the statute." Pet. App. 9a. The requirements—both as to timeliness and an application's required contents—are included in the same paragraph and, except for the allegation of substantial justification, in the same sentence. Because the statute "[u]se[s] * * * the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements * * * [,] all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction." *Ibid.* Thus, the pleading requirements of Section 2412(d)(1)(B) set forth the irreducible minimum of an EAJA application that must be timely filed within the statutory period.[1]

[1] Contrary to petitioner's suggestion (Pet. 25-26), little import should be placed on the fact that the required allegation of no substantial justification is included in the subsequent sentence rather than the sentence with the time limit and the other three application requirements that must be "show[n]" by the applicant. Instead, the second sentence is best understood as an effort to preserve parallel sentence structure and make clear that a lack of substantial justification need only be "allege[d]" by the applicant. 28 U.S.C. 2412(d)(1)(B). Petitioner also erroneously relies (Pet. 27-28) on the fact that Section 2412(d)(1)(A) places on the government the burden of showing that the government's position is substantially justified. Regardless of the burden of *proof* on the issue, Congress unambiguously placed the burden on the applicant to make a timely *allegation* in his application that he is entitled to fees because the government's position was not substantially justified.

Petitioner argues (Pet. 22) that the Court of Appeals for Veterans Claims in the underlying civil action against the United States had jurisdiction over the case and thus "it would be strange, indeed unprecedented, to require a litigant to establish jurisdiction in the same court twice." The Court of Appeals for Veterans Claims, however, had no authority, *i.e.*, no jurisdiction, to award petitioner attorney's fees absent the specific and express waiver of sovereign immunity in EAJA itself. *Lane* v. *Pena*, 518 U.S. at 197 ("Where a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived.") (citation omitted); accord *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-320 (1986). Moreover, contrary to petitioner's assertion, nothing in Section 2412(d)(1)(A) "recognizes that a court entertaining an EAJA application *already* has jurisdiction." Pet. 22. Section 2412(d)(1)(A) authorizes the court to award to a prevailing party attorney's fees the party incurs in any civil action "brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the

United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). That provision merely recognizes that the party must incur fees in a case in which the court *had* jurisdiction; the provision does not purport to give the court jurisdiction to award attorney's fees when the prevailing party does not comply with the statutory prerequisites during the thirty-day period specified in Section 2412(d)(1)(B). *Bryan* v. *OPM*, 165 F.3d 1315, 1321 (10th Cir. 1999) (EAJA time limits jurisdictional); accord *Yang* v. *Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994); *Newsome* v. *Shalala*, 8 F.3d 775, 777 (11th Cir. 1993); *Damato* v. *Sullivan*, 945 F.2d 982, 986 (7th Cir. 1991); *Welter* v. *Sullivan*, 941 F.2d 674, 675 (8th Cir. 1991); *Peters* v. *Secretary of HHS*, 934 F.2d 693, 694 (6th Cir. 1991); *J.M.T. Mach. Co.* v. *United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987).

2. The court of appeals' decision is also supported by the history and purpose of EAJA to prevent EAJA applications from growing into a "second major litigation." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988). The Senate Report on the bill that became the 1985 EAJA amendments explained that the "thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984);[2] see H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985). Congress similarly rejected a proposal

[2] Although the cited 1984 Senate Report accompanied a bill that was eventually vetoed by the President, the bill that became law included the thirty-day filing period without modification. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985); *Huffman* v. *OPM*, 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001). Many courts, including this Court, have relied on the 1984 Senate Report to interpret the EAJA amendments. *Melkonyan* v. *Sullivan*, 501 U.S. 89, 96 (1991); *Commissioner, INS* v. *Jean*, 496 U.S. at 159 n.7.

that would allow time extensions to be granted.[3] Congress was clearly attuned to the potential for high costs in resolving EAJA claims.[4] Congress did not want EAJA litigation to "unduly prolong many law suits to the detriment of the parties and our system of justice." H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 27 (1980) (additional views of Rep. LaFalce); see *Equal Access to Justice Act of 1979: Hearings on S. 265 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary*, 96th Cong., 1st Sess. 43 (1979) (Sen. DeConcini).

Accordingly, Congress in drafting EAJA sought to "authorize * * * relief * * * in as *concise* and *precise* a fashion as possible" in order to "avoid any measure that will itself breed additional litigation." H.R. Rep. No. 1005, *supra*, at 28 (emphasis added). In sum, Congress envisioned a stream lined procedure to resolve fee disputes. That end would not be served by petitioner's reading of EAJA, the logic of which would permit an applicant to file an EAJA application that stated *none* of the pleading requirements of Section 2412(d)(1)(B). That approach would invite disputes over the adequacy of filings and the extent of prejudice to the government. In other words, it would invite exactly the sort of process that threatens to grow into a

[3] *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 15 (1983).

[4] See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 22 (1980) (Congressional Budget Office report illustrating the costs involved in litigating EAJA claims); *Equal Access to Justice Act of 1979: Hearings on S. 265 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 9 (1979).

"second major litigation." *Pierce*, 487 U.S. at 563. Instead, by requiring a complete application to confer jurisdiction on the district court, the EAJA application provision helps ensure that fee disputes will be resolved promptly and efficiently.

3. This Court's review is not warranted to consider petitioner's primary claim (Pet. 21-25) that the provision at issue here should not be considered jurisdictional because, in petitioner's view, EAJA is subject to principles of equitable tolling under this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). Petitioner faults the court of appeals because "it ignored—indeed, did not even cite," *Irwin*, which petitioner views as "the key precedent on point." Pet. 21. But the court's failure in its initial decision to discuss equitable tolling or to cite *Irwin* is presumably fully explained by petitioner's failure to raise equitable tolling or to cite *Irwin*. See 01-1360 U.S. Br. in Opp. at 12 n.6. Rather, petitioner mentioned *Irwin* for the first time in his reply brief, and it is established practice that courts will not hear arguments first raised in reply briefs. See *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 895 (1988).

Nor should the court of appeals be faulted for neither citing *Irwin* nor addressing the issue of equitable tolling upon remand from this Court. In its remand order, the Court did not instruct the court to address *Irwin* or the issue of equitable tolling, notwithstanding petitioner's argument in his first certiorari petition that the federal circuit decision was "at odds with this Court's decision in *Irwin*." 01-1360 Pet. at 17. The Court simply remanded for reconsideration in light of *Edelman*, a case which does not cite *Irwin* or involve the issue of equitable tolling. This Court's decision in *Edelman* in no way retroactively excused petitioner's

failure to pursue his *Irwin* argument. Accordingly, because petitioner failed to timely raise the issues on which he now seeks review and the court below has not considered those issues, this Court should decline to consider petitioner's claims in the first instance. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

Moreover, this case would not be an appropriate vehicle to consider petitioner's contention (Pet. 24-25) that he met the requirements of equitable tolling. As discussed, the court below did not consider the issue. It is also not at all clear that principles of equitable tolling would apply to EAJA's jurisdictional time limits. The general rule is that equitable tolling is not available with respect to time periods that are jurisdictional, rather than mere statutes of limitation (*Stone* v. *INS*, 514 U.S. 386, 405 (1995); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)), and the majority of courts have concluded that equitable tolling does not apply to EAJA's 30-day application period. See, *e.g.*, *Birnell* v. *Apfel*, 76 F. Supp. 2d 1195, 1199 (D. Kan. 1999); *Allbritton* v. *HHS*, 796 F. Supp. 35, 41 (D. Mass. 1992) ("Because the First Circuit has ruled that the thirty-day period is jurisdictional, [equitable tolling] is unavailable."); *Epling* v. *United States*, 958 F. Supp. 312, 314-315 n.1 (W.D. Ky. 1997); but see *Luna* v. *Department of HHS*, 948 F.2d 169, 173 (5th Cir. 1991) (applying equitable tolling to EAJA).

Even assuming equitable tolling is available under EAJA, petitioner could not prevail under such a theory. The doctrine of equitable tolling is "extended * * * only sparingly," and does not extend to a situation, like here, where petitioner's failure to follow clear statutory requirements is "at best a garden variety claim of ex-

cusable neglect." *Irwin*, 498 U.S. at 96.[5] Petitioner argues (Pet. 25 n.8) that his pleading defect "was induced by the government's misconduct" because the government did not file a response within 30 days of petitioner's premature application as required by petitioner's reading of then-extant Vet. App. R. 39. The government, however, did not cause petitioner to file a defective pleading; that error was caused by petitioner's counsel. See Response to Appellee's Motion to Dismiss Motion for Leave to Supplement Filing 3 ("the omission of the allegation as to substantial justification was the error of counsel").

Moreover, there is no evidence that the government's failure to file a response to petitioner's premature pleading at that time was a result of an intent to lull petitioner into not correcting a defective pleading, and indeed the CAVC issued an order that notified the government that its response was due 30 days after petitioner's application was *filed*, not 30 days after petitioner served its application on the government as suggested by petitioner. 01-1360 Br. in Opp. App. 1a. In any event, petitioner cites no basis for contending that the government had an obligation to bring a pleading defect to petitioner's attention so that petitioner would have had time to correct the mistake before the expiration of the 30-day period following final judgment. In those circumstances, it would not be appropriate to extend the doctrine of equitable tolling

[5] Petitioner therefore errs in reading (Pet. 24) *Irwin* to make equitable tolling applicable whenever a defective pleading is filed "during the statutory period." Such an expansive reading of the doctrine of equitable tolling would swallow congressionally mandated pleading requirements by encompassing a "garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96.

to excuse petitioner's mistake in filing a defective EAJA application.

4. Contrary to petitioner's claim (Pet. 25-28), the court of appeals decision also comports with this Court's decision in *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002). In *Edelman*, this Court held that a timely discrimination charge filed pursuant to Title VII, 42 U.S.C. 2000e-5(e)(1), need not include within the time period a verification of the charge that is required by 42 U.S.C. 2000e-5(b). 535 U.S. at 115.[6] The Court reasoned that the provision requiring verification "merely requires the verification of a charge, without saying when it must be verified." *Id.* at 112. The time limit likewise merely provides "that a charge must be filed within a given period, without indicating whether the charge must be verified when filed." *Ibid.*

There is no such textual ambiguity under EAJA, as the court of appeals explained (Pet. App. 13a). Instead, EAJA incorporates the time limit and the required application contents in the same paragraph—indeed, for the most part in the same sentence: it provides that a party seeking fees "*shall*, within thirty days * * * submit to the court an application for fees * * * *which shows that*" the party prevailed and is eligible, includes an itemization of time expended and the rate at which fees were charged, and alleges that the government's position was not substantially justified. 28 U.S.C. 2412(d)(1)(B) (emphasis added). Unlike the ambiguous

[6] Section 2000e-5(b) provides that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 2000e-5(e)(1) provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."

Title VII language at issue in *Edelman*, EAJA's text unambiguously requires a timely allegation that the government's position lacked substantial justification. Indeed, the Court in *Edelman* recognized that the agency could have permissibly construed Title VII to require a plaintiff to file a verified charge within the charge-filing time limit. 535 U.S. at 114 n.8; accord *id.* at 121 (O'Connor, J., with whom Scalia, J., joins, concurring in the judgment) ("the best reading of the statute is that a charge must be made under oath or affirmation within the specified time").

Morever, the Court in *Edelman* relied on the "consisten[t] * * * background law" that allows a verification or signature requirement to relate back to an otherwise timely filed pleading. 535 U.S. at 116. By contrast, courts, including this Court, regularly treat content requirements as necessary to confer jurisdiction. Pet. App. 16a-17a; *Edelman*, 535 U.S. at 116 ("the timing and content requirements for the notice of appeal [are] 'jurisdictional in nature'"); see also *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001) (signature need not be included on notice of appeal, but content and timing requirements "are indeed linked jurisdictional provisions"); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (failure to name a party in a notice of appeal "constitutes a failure of that party to appeal"). Accordingly, there is no background tradition consistent with allowing petitioner's incomplete EAJA application to confer jurisdiction on the district court. Rather, until *all* of the information required by Section 2412(d)(1)(B) is provided, no application has been "submit[ted]" (*ibid.*) under the statute. See, *e.g.*, *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160 (1990) ("A fee application *must contain* an allegation 'that the position

of the United States was not substantially justified.'") (emphasis added).

Two other related features distinguish Title VII from EAJA and inform the proper interpretation of Section 2412(d)(1)(B). First, Title VII "is 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" Pet. App. 13a (quoting *Edelman*, 535 U.S. at 115). By contrast, the "EAJA statute * * * is directed to attorneys seeking attorney fees," and thus the same "paternalistic protection" against inadvertent forfeiture of rights "is not required." *Ibid.* Second, whereas the Court has construed Title VII in light of its remedial purposes, *e.g.*, *Love* v. *Pullman Co.*, 404 U.S. 522, 526- 527 (1972), Congress passed EAJA against the settled backdrop that waivers of sovereign immunity must be narrowly construed. See p. 7, *supra*. There is accordingly no basis to stretch the plain language of Section 2412(d)(1)(B) to permit defective EAJA applications to be cured after the statutory deadline has passed. Finally, the effect of the recent *Edelman* decision on EAJA's time limits is not an issue that other circuits have had an opportunity to address.

5. Petitioner urges (Pet. 16-21) that certiorari is warranted to resolve a conflict in the circuits on the question presented. It is not clear, however, that the court of appeals' decision will adversely affect EAJA applicants with any significant frequency or that the conflict is of great practical importance. EAJA applications will nearly always be prepared by attorneys, who will presumably follow the decision below when filing EAJA applications in the Federal Circuit. Compliance with the Federal Circuit's rule requires making a simple declarative sentence in the fee petition. Moreover, unlike a conflict that creates different rules governing primary conduct in different parts of the

country, the conflict here only affects the conduct of attorneys preparing fee petitions in litigation against the government. It creates no material inconsistency if lawyers litigating in the Federal Circuit are on notice from a governing precedent that Section 2412(d)(1)(B) means what it says and will be taken seriously, while lawyers in the other circuits that have addressed the issue are on notice that they have greater latitude in making an EAJA filing. Moreover, because lawyers in other circuits will lose their claim to fees if the government is prejudiced by omissions in the application—an outcome outside the applying lawyer's control—other lawyers across the country have every incentive to ensure that their initial applications include all the statutorily required information in a timely fashion.

The conflict in authority does not create any prejudice. The government suffers no prejudice from the rule of other circuits because those circuits excuse only filings that do not prejudice the government. Moreover, there is no prejudice to litigants in the Federal Circuit now that the rule is clearly established. Although petitioner notes (Pet. 20 n.6) instances in which litigants did not timely file an EAJA application containing the requirements of Section 2412(d)(1)(B), all those decisions were issued before the Federal Circuit decision in this case (and, for that matter, before the Federal Circuit's earlier ruling that has been vacated).

Finally, the decision below recognizes that, as long as an applicant timely alleges the pleading jurisdictional prerequisites under EAJA, the applicant will be permitted "some latitude to supplement his application to flesh out the missing details." Pet. App. 9a. Accordingly, because there is no reason to conclude that the decision below will lead to the inadvertent filing of

defective EAJA applications, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
WILLIAM KANTER
AUGUST E. FLENTJE
Attorneys

JULY 2003

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No. 02-1657

IN THE

Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

July 21, 2003

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PETITIONER'S REPLY BRIEF

1. The opposition's most important feature, and the only one that bears on whether review is warranted, is its repeated acknowledgment of a direct conflict among the circuits on the question presented. *See, e.g.,* Opp. 4, 5, 17, 18. Despite this concession, the government says that review should be denied because the conflict "creates no material inconsistency" as lawyers "in the Federal Circuit are on notice" of its strict rule concerning the jurisdictional prerequisites for EAJA applications. *Id.* at 18. If that were a proper basis for denying certiorari, however, this Court would never grant review in a case where it could be said that the rule imposed by the court of appeals does not affect "primary conduct," *see id.*, and that litigants need only adhere strictly to that rule no matter how technical, picayune, or at odds with Congressional intent.

But this Court consistently rejects that approach, as it did when it granted certiorari in this very case and remanded in light of *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). It also rejected that approach in a host of other cases where the litigant did not strictly follow the stated rule, but presumably could have done so. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001) (entertaining question whether requirement that notice of appeal be signed is jurisdictional or subject to amendment after time to appeal has run); *Smith v. Barry*, 502 U.S. 244 (1992) (entertaining question whether failure to file notice of appeal as required by Federal Rule of Appellate Procedure 3 is cured by filing of appellate brief that contains functional equivalent of what Rule requires); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990) (entertaining question whether Title VII's limitations period as applied to government is jurisdictional or subject to equitable exceptions); *Torres v. Oakland Scavenger Co.,* 487 U.S. 312 (1988) (entertaining question whether requirement that notice of appeal name all appellants must be literally followed or "et al." designation is

sufficient in some circumstances); *Foman v. Davis*, 371 U.S. 178 (1962) (entertaining question whether appellant must strictly comply with requirement that notice of appeal refer specifically to order appealed from or whether court may look beyond notice to ascertain appellant's intent). In each of these cases, a court of appeals had put future litigants on notice that the relevant rule would be strictly observed without exception, yet the Court granted certiorari to determine the correct outcome and promote national uniformity on an important issue of federal law.

Apart from promoting uniformity, the Court should resolve the circuit split for a more fundamental reason. The government's rationale for overlooking the circuit split presupposes that no important purpose is served by a rule that permits flexibility in construing a Congressional limitations period. That is not so. Doctrines that allow amended pleadings and motions to "relate back" to the original filing date, and concepts of equitable tolling, estoppel, waiver, and the like do, in fact, serve an important purpose: They recognize that both lay people and lawyers sometimes make mistakes, and they ask whether, under the circumstances, those mistakes ought to be excused because the benefit of doing so outweighs the harm created by strict imposition of a time bar or other procedural rule. *See, e.g., Foman*, 371 U.S. at 182 ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."); *cf. Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."). Thus, the government's position — that future EAJA fee applicants in the Federal Circuit can avoid a problem by

strictly adhering to the 30-day time period — simply assumes the answer to the basic question whether Congress intended that the various goals of EAJA would be best served by a strict jurisdictional time bar or by a more flexible rule such as that adopted by the Third, Sixth, and Eleventh Circuits.

2. Unable to deny the circuit split, the government devotes most of its argument to the proposition that the Federal Circuit's holding is correct. Opp. 7-17. That a respondent believes that the decision below is correct is not a sufficient reason to leave a split in appellate authority unresolved, especially where three circuits fundamentally disagree with respondent's position on the question presented.

a. As the Third, Sixth, and Eleventh Circuits have explained, even assuming that the 30-day filing deadline is jurisdictional and admits of no exceptions, there is no reason to believe that Congress intended that jurisdictional bar to apply to the contents of the fee application. *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985); *United States v. True*, 250 F.3d 410 (6th Cir. 2001); *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000).[1] Rather, as those courts have explained, once a timely fee application is filed, EAJA's concerns with timeliness, finality, and reliance "have been satisfied[,]" *see, e.g., Dunn*, 775 F.2d at 104, and there is no basis for extending the 30-day time limit to EAJA's pleading requirements. As a result, those courts have permitted supplementation of a timely fee

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[1]The government concedes that there is also a conflict in the circuits on the antecedent question whether EAJA's 30-day period is jurisdictional. Opp. 13 (citing *Luna v. Dept. Of HHS*, 948 F.2d 169, 173 (5th Cir. 1991), which held that EAJA's 30-day limit is not jurisdictional and is subject to equitable tolling). *See* Pet. 23-24 (describing the conflict).

application, absent prejudice to the government.

b. The government offers no meaningful response to the fact that the statute's limitation period is contained in a separate sentence from its requirement that the party allege that the position of the United States was not substantially justified. Thus, even if EAJA's other pleading requirements must be completed within 30 days — a conclusion flatly rejected by *Dunn*, *True*, and *Singleton* — that cannot be said for the no-substantial-justification allegation. The government's only response is to speculate that Congress placed what an application must "show" in a different sentence from what a party must "allege" in "an effort to preserve parallel sentence structure." Opp. 8 n.1. Even if it were grammatically difficult to list all four pleading items in the first sentence of 28 U.S.C. § 2412(d)(1)(B), that would not explain why Congress did not add a 30-day time period in the second sentence of that section if it wanted that sentence to bear the meaning given to it by the Federal Circuit.

In any event, use of two separate sentences was not grammatically necessary. If Congress had wanted to merge the two sentences into one, it could have done so very easily, just as the Solicitor General has done twice in its opposition. Opp. 8, 15; *see also* Pet. App. 4a (Federal Circuit opinion also merging both sentences into one without grammatical incident). Thus, when construing the two distinct and differently worded sentences of section 2412(d)(1)(B), courts should apply the "general[] presum[ption] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (internal quotation marks and citation omitted); *see also, e.g., Edelman*, 535 U.S. 106 (limitations period for filing Title VII charge of

discrimination contained in one subsection of 42 U.S.C. § 2000e-5 does not apply to other subsection's requirement that charge be verified); *Quern v. Mandley*, 436 U.S. 725, 741-42 (1978) (specific requirements explicitly applicable to one state program funded under Social Security Act does not apply to another such program because "there is every reason to suppose that the exclusion of [that program] from [the] specific substantive requirements . . . was deliberate").

c. Even assuming that Congress contemplated that section 2412(d)(1)(B)'s pleading requirements be met within the 30-day period, that period is not a "jurisdictional" time bar, but rather a statute of limitations subject to equitable exceptions. *See* Pet. 17-19. Therefore, an amendment to an EAJA fee application, such as the amendment filed by petitioner just days after the government moved to dismiss his application, "relates back" to the original filing date, *see Edelman*, 535 U.S. 106; *see also Becker v. Montgomery*, 532 U.S. 757 (2001); Fed. R. Civ. P. 15(c), and fee applicants may avoid dismissal under equitable doctrines such as tolling, estoppel, and waiver, absent prejudice to the government.[2]

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[2]As explained in the petition (at 22), EAJA's 30-day filing period is not jurisdictional because it applies to fee applications filed "in any court" already "having jurisdiction" in the underlying action. 28 U.S.C. § 2412(d)(1)(A). The government's only response is tautological: It claims that EAJA "does not purport to give the court jurisdiction" and then cites cases holding that the 30-day period is "jurisdictional." Opp. 10. Thus, the government does not respond to the criticism that its reading of EAJA would require litigants such as petitioner to establish jurisdiction in the same court twice — once when they file the underlying action and again when they file their fee application — which is unprecedented and makes no sense. This point serves to show why the government's reliance on cases

(continued...)

The government's position relies heavily on a Senate Report that states that section 2412(d)(1)(B)'s filing period "is jurisdictional and cannot be waived." Opp. 7 (quoting S. Rep. No. 98-586 16 (1984)). Even if reliance on the report were appropriate, a snippet in a committee report cannot overcome the *Irwin* presumption that time limits that run in favor of the government are *not* jurisdictional unless "Congress ... provide[s] otherwise." 498 U.S. at 96. In any event, the committee report cited by the government is not valid authority because it was prepared for a 1984 version of EAJA passed by the *98th Congress* and *vetoed* by the President. *See* H.R. Rep. No. 99-120 (I) 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134; *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring).

The government acknowledges that this report accompanied vetoed legislation, but claims it is reliable nonetheless because the Court has cited it in EAJA cases. Opp. 10 n.2. However, for present purposes, its inherent *unreliability* is demonstrated by the more in-depth House Report from the *99th Congress* that accompanied the bill that actually became law in 1985, which contains the same general discussion of the statute's limitations period and cites the same authority as did the earlier 1984 report, *but omits the language upon which the government relies.* H.R. Rep. No. 99-120 (I) 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148. Indeed, it would have been anomalous for the 99th Congress to have made the limitation period strictly jurisdictional because,

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[2](...continued)
concerning the content requirements for notices of appeal are irrelevant. *See* Opp. 16 (citing, *e.g.*, *Torres*, 487 U.S. 312). A notice of appeal serves to confer jurisdiction on a court in the first instance; a fee application does not.

at the same time, it urged that the period not be construed in an "overly technical" manner as a "trap for the unwary." *Id.* at 18 n.26; H.R. Rep. No. 99-120 (II) 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156. In sum, there is no basis for the government's assertion that EAJA's 30-day filing period is an absolute jurisdictional bar.

d. The government argues that petitioner cannot rely on the equitable tolling principles of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), on the ground that he did not raise them in his opening brief in the Federal Circuit. Opp. 12.[3] Not so. Petitioner raised equitable tolling and estoppel, as well as the equitable principles enunciated in *Dunn* and *Singleton*, in both his opening and reply briefs in the Federal Circuit. Brief for Appellant, at 5-10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000); Reply Brief for Appellant, at 3-5, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 24, 2001). Indeed, the government acknowledged petitioner's arguments on this score, and asserted that, regardless of the facts, petitioner's application was barred because the 30-day period imposed an absolute jurisdictional bar. Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

Equally important, at three stages before this Court and the Federal Circuit — in his first petition for certiorari, on remand from this Court, and on rehearing en banc prior to remand — petitioner raised equitable tolling and three times the

---

[3]Notably, the government does not argue that the question whether EAJA's limitation period is jurisdictional — which also involves application of *Irwin* — has been waived, nor could it since that question is at the heart of the circuit split, was argued extensively below, and formed the basis of both Federal Circuit decisions.

government argued the merits of equitable tolling without asserting that the argument had been waived. Not until its brief in response to petitioner's request for rehearing en banc after this Court's remand did the government breathe a word about waiver. Even there, it did so only in passing, suggesting that petitioner should be defaulted for failing to use the magic words "tolling" or "relation back," but acknowledging that petitioner raised the substance of the argument. Corrected Appellee's Resp. to Pet. for Rehearing En Banc, at 14 & n.8, in *Scarborough v. Principi*, No. 00-7172. *See Nelson v. Adams*, 529 U.S. 460, 469 (2000) (the general rule that issues be raised to be preserved "does not demand the incantation of particular words; rather it requires that the ... court be fairly put on notice of the substance of the issue."). Thus, if anyone has waived an argument, it is the government by arguing the tolling issue over the course of many briefs without suggesting that petitioner had forfeited it. *See Engle v. Isaac*, 456 U.S. 107, 125 n.26 (1981) (declining to consider habeas corpus petitioner's claim that government waived an argument because petitioner's waiver argument had itself been waived); *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991) (considering defendant's claim of waiver to be waived); *Wilson v. Attaway*, 757 F.2d 1227, 1247 (11th Cir. 1985) (plaintiff's assertion that qualified immunity had been waived came too late and was itself waived).[4]

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[4]The government claims that this case is not an appropriate vehicle to consider tolling because "the Court below did not consider the issue." Opp. 13. That assertion makes no sense. The Federal Circuit did not *explicitly* address that issue for an obvious reason: It held, contrary to the rule in three other circuits, that EAJA's pleading requirements are "jurisdictional" and not subject to *any* exceptions. Pet. App. 5a-10a. It did not allow petitioner to amend his fee

(continued...)

On the question whether tolling applies here, the government relegates to a footnote its conclusory response to petitioner's claim that he is entitled to tolling under *Irwin*, which requires that he "actively pursued his judicial remedies by filing a defective pleading during the statutory period[.]" 498 U.S. at 96; *see* Opp. 14 n.5. The government does not dispute that, as a factual matter, petitioner meets this standard, but rather says that equitable tolling is not available just because that standard has been met. *Id.* To be sure, the doctrine may not apply where the adverse party would suffer prejudice from tolling. But in explaining the applicable standard, *Irwin* provided specific examples in which this Court has allowed tolling — involving the timely filing of a complaint *in the wrong court*. *Id.* at 96 n.3 (citing cases). If anything, those cases were less deserving of forbearance than the situation here, where petitioner "actively pursued his judicial remedies" *in the correct court*, *id.* at 96, by filing a timely fee application that was defective, if at all, only because it was missing a one-sentence legal conclusion.

3. After devoting nearly its entire brief to the claim that EAJA's 30-day period permits no exceptions, the government switches gears. It ends its brief by arguing that the decision below will not prejudice fee applicants too greatly because "as long as an applicant timely alleges the pleading jurisdictional prerequisites under EAJA," the applicant will be granted "'some latitude to supplement his application to flesh out the missing details.'" Opp. 18 (quoting Pet. App. 9a). The "some latitude" standard is imprecise and does not apprise fee

---

[4](...continued)
application to supply the no-substantial-justification allegation because it believed that it was without power to excuse any non-compliance with the 30-day deadline.

applicants of what is expected or provide guidance to the lower tribunals within the Federal Circuit. Under the "some latitude" standard, that court has excused an EAJA applicant's failure to make any allegation about his fee eligibility (net worth) on the ground that the net-worth allegation is "subsumed" by an applicant's statement that he was the prevailing party, *see Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998), even though there is no obvious relation between the two concepts. By contrast, the Federal Circuit affirmed the dismissal of petitioner's application, even though it contained the prevailing-party allegation, on the ground that it did not include a no-substantial-justification allegation, even though the two concepts are intimately related, since both concern how the government fared on the merits of the litigation. And, recently, the Court of Appeals for Veterans Claims refused to allow amendment of an EAJA application to supply two of the four pleading requirements that were contained in a part of the application that was lost during fax transmission to the court clerk, even though the application was served on the government and faxed to the court on a timely basis. *Urquhardt v. Principi*, 2003 WL 1463586 (Vet. App. Mar. 19, 2003). The court opined that it preferred the Third Circuit's approach in *Dunn*, but that its hands were tied by the decision below. *Id.* at *2. So much for "some latitude." Far from providing a reason to deny review, given the high volume of EAJA cases under the Federal Circuit's supervision, *see* Pet. 5 & n.1, 19-21 & n.6, the government's embrace of the "some latitude" standard underscores the need for this Court to grant the petition and resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Wolfman
(Counsel of Record)
Scott L. Nelson
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

July 21, 2003

Attorneys for Petitioner

Supreme Court, U.S.
FILED
NOV 7 2003
OFFICE OF THE CLERK

No. 02-1657

IN THE

Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

JOINT APPENDIX

THEODORE B. OLSON
Solicitor General
(*Counsel of Record*)
Department of Justice
Washington, D.C. 20530
(202) 514-2217

Counsel for Respondent

BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

Petition For A Writ Of Certiorari Filed May 9, 2003

Certiorari Granted September 30, 2003

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RELEVANT DOCKET ENTRIES

United States Court of Appeals for Veterans Claims

Docket No. 98-1590

Randall C. Scarborough, Appellant,

v.

Secretary of Veterans Affairs, Appellee.

Date	Filings and Proceedings
8/28/98	Notice of Appeal (M - 8/1/98) (GATEAC)
9/1/98	Notice of Docketing for FF or MOT by 9/15/98; BVA DEC by 10/1/98; DR by 11/2/98 (M - 8/1/98) (GATEAC)
9/21/98	Copy of BVA Decision (M - 9/21/98) (WILLIA)
4/22/99	Appellant's Brief (M - 3/22/99) (GATEAC)
5/10/99	Appellee's Brief (M - 5/10/99) (DESHAP)
5/24/99	Appellant's Reply Brief (M - 5/21/99) (DESHAP)
7/9/99	Ord that the BVA decn is vacated and the matter is remanded (KRAMEK)

7/22/99	RECEIVED: Application for atty's fees under EAJA (M - 7/20/99) (MEYERK)
7/23/99	Notice returning appellant's EAJA applic (M - 7/20/99) (MEYERK)
8/2/99	Judgment (M - 5/21/99) (TOBESS)
8/19/99	RECEIVED: Application for atty's fees under EAJA (M - 8/17/99) (MEYERK)
10/4/99	Mandate (M - 7/20/99) (TOBESS)
10/4/99	Application for atty's fees under EAJA (M - 9/17/99) (TOBESS)
10/4/99	Ord that the appellee's resp is due 11/3/99 (STS)
11/3/99	Mo of appellee to ext time to file a response to EAJA applic until 12/3/99 (M - 11/3/99)
11/3/99	Clerk's ord granting appellee's mo for ext of time until 12/3/99 (KM)
12/3/99	Mo of appellee to dismiss EAJA applic (M - 12/3/99)
12/9/99	Appellant's response to appellee's mo to dismiss and mo for lv to suppl EAJA applic (M - 12/9/99) (MEYERK)
12/9/99	RECEIVED: Amendment to Application for atty's fees under EAJA (M - 12/9/99) (MEYERK)

1/6/00	Mo of appellee for leave to file a response to appellant's mo for lv to suppl filing (M - 1/6/00)
1/6/00	RECEIVED: Appellee's response to appellant's mo for lv to suppl filing (M - 1/6/00) (MEYERK)
5/31/00	Ord this appeal is submitted to Judges Kramer, Holdaway and Greene (RFC) (KRAMEK) (HOLDAR) (GREENW)
6/14/00	Ord that appellant's EAJA applic is dismissed for lack of juris (KRAMEK) (HOLDAR) (GREENW)
8/14/00	Appellant's Notice of Appeal to the USCA for the Fed Cir (MEYERK)

IN THE UNITED STATES COURT
OF VETERANS APPEALS

RANDALL C. SCARBOROUGH, Appellant,	)	
v.	)	APPLICATION FOR FEES AND OTHER COSTS
TOGO D. WEST, JR., Secretary of Veterans Affairs,	)	
Appellee.	)	

NOW COMES the undersigned counsel for the Appellant, and pursuant to the Order for remand filed in the above case on July 9, 1999, hereby applies to the court for an order approving its fees and other costs pursuant to 28 USC §2412.

In support of said application, the undersigned shows the court that:

1. Appellant is the prevailing party as defined in 28 USC §2412 in the above captioned matter pursuant to an Order for remand filed in this court on July 9, 1999.

2. Appellant's net worth did not exceed $2,000,000.00 as of the date of the filing of this action.

3. The undersigned counsel has represented the Appellant since August 28, 1998.

4. The undersigned has incurred legal fees in connection with the appeal of this matter such as:

a. Preparation of Record on Appeal

b. Telephone conference with Clerk/Court of Veterans Appeals

c. Prepare Appellant's Brief

d. Prepare Appellant's Reply Brief

5. The attached statement itemizes the expenses incurred by the undersigned with respect to this matter.

WHEREFORE, the undersigned counsel for the Appellant respectfully prays the court for an order allowing fees in the amount of $19,333.75 and costs in the amount of $117.80.

This the 20 day of July, 1999.

WALLACE, CREECH & SARDA, L.L.P.

Peter J. Sarda
Attorneys for Appellant
N.C. Bar No. 7300
Post Office Box 12065
Raleigh, North Carolina 27605
Telephone: (919) 782-9322

UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

NOTICE OF RETURNED PAPERS

No. 98-1590 Date: July 23, 1999

RANDALL C. SCARBOROUGH, Appellant,

v.

TOGO D. WEST, JR.,
ACTING SECRETARY OF VETERANS AFFAIRS, Appellee.

To the Appellant: The attached material that you sent to the Court is not accepted for filing. It is returned without action because:

Your application for attorney fees and expenses under the Equal Access to Justice Act (EAJA) is premature and is not accepted for filing. Rule 39 provides that your application must be filed within 30 days **after** the Court's judgement becomes final. Judgement will be entered after the time for post-decision motions under Rule 35 expires. That judgement will become final sixty days thereafter unless there is an appeal to the U.S. Court of Appeals for the Federal Circuit. Then you may file and serve your application.

ROBERT F. COMEAU

Clerk of the Court

Attachments (to appellant only):

EAJA application, received 7/22/99

Copies to:

Peter J. Sarda, Esq.
P.O. Box 12065
Raleigh, NC 27605

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

IN THE UNITED STATES COURT
OF VETERANS APPEALS

RANDALL C. SCARBOROUGH, Appellant,	)	
v.	)	APPLICATION FOR FEES AND OTHER COSTS
TOGO D. WEST, JR., Secretary of Veterans Affairs,	)	
Appellee.	)	**[filed 10/4/99]**

NOW COMES the undersigned counsel for the Appellant, and pursuant to the Order for remand filed in the above case on July 9, 1999, hereby applies to the court for an order approving its fees and other costs pursuant to 28 USC §2412.

In support of said application, the undersigned shows the court that:

1. Appellant is the prevailing party as defined in 28 USC §2412 in the above captioned matter pursuant to an Order for remand filed in this court on July 9, 1999.

2. Appellant's net worth did not exceed $2,000,000.00 as of the date of the filing of this action.

3. The undersigned counsel has represented the Appellant since August 28, 1998.

4. The undersigned has incurred legal fees in connection with the appeal of this matter such as:

a. Preparation of Record on Appeal

b. Telephone conference with Clerk/Court of Veterans Appeals

c. Prepare Appellant's Brief

d. Prepare Appellant's Reply Brief

5. The attached statement itemizes the expenses incurred by the undersigned with respect to this matter.

WHEREFORE, the undersigned counsel for the Appellant respectfully prays the court for an order allowing fees in the amount of $19,333.75 and costs in the amount of $117.80.

This the 17 day of August, 1999.

WALLACE, CREECH & SARDA, L.L.P.

_____

Peter J. Sarda
Attorneys for Appellant
N.C. Bar No. 7300
Post Office Box 12065
Raleigh, North Carolina 27605
Telephone: (919) 782-9322

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

[filed 10/4/99]

No.98-1590

RANDALL C. SCARBOROUGH, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

ORDER

The appellant's premature application for attorney fees and expenses is filed today. It is ORDERED that the Secretary's response is due within 30 days after the date of this order.

DATED: Oct 4 1999

FOR THE COURT:

ROBERT F. COMEAU
Clerk of the Court

By: _____
Deputy Clerk

Copies to:

[names of counsel omitted]

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

RANDALL C. SCARBOROUGH, Appellant,	)
v.	) Vet. App. No. 98-1590-
	) EAJA
TOGO D. WEST, JR.,	) VA File No. SS 246
Secretary of Veterans Affairs,	) 82 9124
Appellee.	) **[filed 12/9/99]**

AMENDMENT TO FEE APPLICATION

The Appellant hereby amends his Application for Fees and Costs filed October 4, 1999 by adding the following paragraph:

6. The government's position that the Appellant had not shown clear and unmistakable error in the 1976 R.O.'s decision was not substantially justified. Because a cursory review of the medical records of the veteran show the error by the R.O. and because the authority cited by the government in its brief were mere recitations of the law on clear and unmistakable error, without an analysis of the law to the facts in this case, the government's defense of the Appellant's claim was not substantially justified.

In all other respects, the veteran reasserts his statements in the original filing under 28 U.S.C. §2412.

This the 9 day of December, 1999.

WALLACE, CREECH & SARDA, L.L.P.

Peter J. Sarda
Attorneys for Appellant
Post Office Box 12065
Raleigh, North Carolina 27605
Telephone: (919) 782-9322

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Supreme Court, U.S.
FILED
NOV - 7 2003
OFFICE OF THE CLERK

(5)

No. 02-1657

IN THE
Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S BRIEF

PETER J. SARDA
WALLACE, CREECH & SARDA, L.L.P.
P.O. Box 12065
Raleigh, NC 27605
(919) 782-9322

BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

November 2003

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QUESTION PRESENTED

Whether an applicant for attorney's fees under the Equal Access to Justice Act is barred from obtaining a fee award by the Act's 30-day statute of limitations solely because the applicant's timely-filed fee application did not initially allege that the position of the government in the underlying litigation lacked substantial justification.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees, on remand from this Court, is reported at 319 F.3d 1346 (Fed. Cir. 2003), and is reproduced in the appendix to the petition for a writ of certiorari ("Cert. App.") at 1a. The opinion of the United States Court of Appeals for Veterans Claims dismissing petitioner's fee application is reported at 13 Vet. App. 530 (2000), and is reproduced at Cert. App. 22a. The original opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees is reported at 273 F.3d 1087 (Fed. Cir. 2001), and is reproduced at Cert. App. 26a. The decision of this Court granting petitioner's first petition for a writ of certiorari and vacating the original judgment of the Federal Circuit for reconsideration in light of *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), is reported at 536 U.S. 920 (2002), and is reproduced at Cert. App. 36a. The unreported post-remand decision of the United States Court of Appeals for the Federal Circuit denying panel rehearing and rehearing en banc is reproduced at Cert. App. 37a. The Federal Circuit's unreported decision denying rehearing and rehearing en banc after its original ruling is reproduced at Cert. App. 39a. The unreported decision of the United States Court of Appeals for Veterans Claims in favor of petitioner on the merits of his disability claim is reproduced at Cert. App. 41a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's fee application was entered on February 13, 2003. Cert. App. 1a. Petitioner filed a timely petition for rehearing en banc on February 24, 2003, which the Federal Circuit treated as a

petition for panel rehearing and for rehearing en banc and denied on April 17, 2003. Cert. App. 37a. The petition for a writ of certiorari was filed on May 9, 2003, and granted on September 30, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States

> was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

STATEMENT OF THE CASE

In a ruling at odds with all other federal appellate precedent, the Federal Circuit below affirmed the dismissal of petitioner Randall Scarborough's application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). It did so on the ground that the application was jurisdictionally barred because it did not allege within the statute's 30-day limitations period that the position of the United States was not substantially justified, even though the application itself was timely filed and Mr. Scarborough promptly amended the application to supply the allegation. As shown below, the Federal Circuit's decision finds no support in EAJA's text or in decisions of this Court regarding limitations periods that run in favor of the federal government. *See, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). It is also flatly inconsistent with the doctrines of relation back and equitable tolling under which the amendment to Mr. Scarborough's fee application should have been accepted, even assuming the no-substantial-justification allegation should have been made within the 30-day period. *See Becker v. Montgomery*, 532 U.S. 757 (2001); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); *Irwin*, 498 U.S. at 96.

A. The Underlying Litigation

Petitioner Randall C. Scarborough served in the United States Navy from 1972 to 1975, when he was discharged because of chronic kidney failure. CAVC Record 56. In 1993, he applied for and was granted disability benefits from the Department of Veterans Affairs ("VA"). The VA agreed with Mr. Scarborough that his kidney failure was incurred during his military service and awarded him a 100% disability rating. CAVC Record 343. A dispute arose, however, concerning the effective date of Mr. Scarborough's disability. Mr. Scarborough contended that his service-connected disability dated back to 1975, and he challenged an earlier March 1976 VA finding that his kidney disease was not service-connected. The Secretary of Veterans Affairs, the respondent in this Court, opposed retroactive benefits, arguing that the VA's 1976 finding was not "clear and unmistakable error," the standard for setting aside that earlier finding.

Mr. Scarborough pursued his case to the Board of Veterans' Appeals ("BVA"), which rejected Mr. Scarborough's claim that the VA had committed clear and unmistakable error. Mr. Scarborough appealed the BVA's decision to the United States Court of Appeals for Veterans Claims ("CAVC"). The CAVC's July 9, 1999, decision began by noting that Mr. Scarborough's case was appropriate for decision by a single judge because it was one "of relative simplicity and the outcome [was] not reasonably debatable." Cert. App. 41a (quoting *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990)). The CAVC then reversed the BVA's decision on the ground that the BVA had failed to consider the legal standards governing whether the 1976 finding was clearly and unmistakably erroneous. The CAVC therefore remanded the case for further determinations regarding that finding. Cert.

App. 42a-43a. On remand, Mr. Scarborough was awarded retroactive benefits for the period 1975 to 1993.

Meanwhile, as the prevailing party in the CAVC, Mr. Scarborough filed the application for attorney's fees under EAJA that gave rise to this case.

B. Applicable EAJA Principles

To understand the dispute over Mr. Scarborough's fee application, it is necessary briefly to review applicable EAJA principles. EAJA was first enacted in 1980 as a three-year experiment "to diminish the deterrent effect of seeking review of, or defending against, governmental action." Pub. L. 96-481, § 202(c)(1), 94 Stat. 2325 (1980). In 1985, Congress reenacted EAJA and made it permanent. Pub. L. 99-80, 99 Stat. 183 (1985). The heart of EAJA — and the section at issue here — is 28 U.S.C. § 2412(d). Under it, attorney's fees and expenses "shall" be awarded to eligible parties who have prevailed in civil litigation against the federal government, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The fee application must be filed "in [the] court having jurisdiction" over the "civil action" in which the fee applicant prevailed on the merits. *Id.* "Eligible" parties include individuals whose net worth does not exceed $2 million, as well as certain corporations and other organizations. *Id.* § 2412(d)(2)(B). To establish its substantial justification defense, the government bears the burden of showing that its position had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

Congress's goals in enacting section 2412(d) were to "encourag[e] private parties to vindicate their rights and [to]

'curb[] excessive regulation and the unreasonable exercise of Government authority.'" *Comm'r, INS v. Jean*, 496 U.S. 154, 164-65 (1990) (quoting H.R. Rep. 1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4991). In other words, "the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Jean*, 496 U.S. at 163.

Of particular relevance here, EAJA provides that a party seeking fees shall submit its fee application within 30 days of "final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). That limitations period is set forth in the first sentence of subsection (d)(1)(B), which describes the information to be included with the fee application:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Id.

The next sentence of subsection (d)(1)(B) — not the sentence containing the 30-day filing period — states that "[t]he party shall also allege that the position of the United States was not substantially justified." *Id.*

When Congress reenacted EAJA in 1985, it defined the statutory term "final judgment" as "a judgment that is final and not appealable...." 28 U.S.C. § 2412(d)(2)(G). Thus, under this definition, the 30-day limitations period does not begin to run until the time to appeal from a judgment on the merits has expired. H.R. Rep. No. 99-120, pt. 1, at 18 n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146. In crafting this amendment, Congress urged that the limitations period not be construed in an "overly technical" manner as a "trap for the unwary." *Id;* H.R. Rep. No. 99-120, pt. 2, at 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156.

C. Proceedings On Mr. Scarborough's Fee Application In The Court Of Appeals For Veterans Claims

On July 20, 1999, just 11 days after he prevailed on the merits in the CAVC, Mr. Scarborough submitted an EAJA application seeking attorney's fees and expenses of $19,333.75 and served the application on counsel for the government. JA 4. However, the Clerk of the CAVC did not file the application. Instead, under a notice dated July 23, 1999, the Clerk returned the application to Mr. Scarborough on the ground that his EAJA application was filed too soon. According to the Clerk, an application may only be filed within 30 days "after the Court's judgment becomes final," and that finality does not occur until after the time for filing post-decision motions and appealing to the Federal Circuit has expired. JA 6.

On August 2, 1999, the CAVC issued a "judgment," which noted that the time for filing post-decision motions had expired. On August 19, 1999, Mr. Scarborough submitted a second EAJA application (the one at issue here). At the same

time that Mr. Scarborough submitted that fee application, he served it on counsel for the government. It is undisputed that Mr. Scarborough's fee application was submitted "within thirty days of final judgment" and contained all of the information called for by the first sentence of 28 U.S.C. § 2412(d)(1)(B). *See* JA 8-9. The application did not, however, contain an allegation that the government's position was not substantially justified.

Under then-applicable CAVC Rule 39(c), the government was required to serve and file its response to the application within 30 days of *service* of the fee application upon it, but the government failed to do so.[1] Meanwhile, Mr. Scarborough's fee application was not immediately filed by the CAVC Clerk. Rather, the Clerk again deemed the application "premature," this time apparently on the ground that the CAVC's mandate had not yet issued in the underlying litigation and, therefore, there was still no "final judgment" in the action. Cert. App. 23a. On October 4, 1999, 46 days after the second fee application was served, the CAVC issued the mandate. On the same date, the CAVC Clerk filed Mr. Scarborough's fee application, which, according to the Clerk, was filed on the first day of EAJA's 30-day filing period. *See* JA 10.[2]

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[1]The version of CAVC Rule 39 in effect when Mr. Scarborough filed his fee application is reproduced in the appendix to this brief at 1a.

[2]The 60-day period to appeal from the CAVC's judgment expired on October 1, 1999. *See* 38 U.S.C. § 7292(a). Thus, properly computed, EAJA's 30-day period commenced on October 2, 1999, and expired on October 31, 1999. Mr. Scarborough's fee application was thus filed on the third day of the 30-day period.

Although the outcome of this case is not affected by it, the (continued...)

After the application was filed, the government sought, and, with Mr. Scarborough's consent, obtained an extension of time to answer the fee application to December 3, 1999. *See* JA 2. On that date, the government moved to dismiss the fee application for lack of subject matter jurisdiction. The government argued that although the fee application was timely filed, Mr. Scarborough was also required to allege that the government's position lacked substantial justification within the 30-day period, which had expired 33 days earlier, on October 31, 1999. *See supra* note 2.

Immediately after receiving the government's motion to dismiss, Mr. Scarborough filed an amendment to his fee application alleging that "[t]he government's position that the Appellant had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." JA 11 (filed Dec. 9, 1999). At the same time, Mr. Scarborough opposed the motion to dismiss, arguing that his omission of the no-substantial-justification allegation was not a jurisdictional defect. Mr. Scarborough also urged that the limitations period be tolled, and that the government be estopped from enforcing it, because the government itself had delayed the case by seeking an extension to file its response to the application and had never demanded Mr. Scarborough's views on the

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[2](...continued)
CAVC Clerk erred when he twice rejected Mr. Scarborough's fee application as "premature." The CAVC mistakenly views EAJA's 30-day filing period as fixing not only the *last day* by which a fee application *must* be filed but also the *first day* on which a fee application *may* be filed. EAJA does not establish the latter requirement. *See Shalala v. Schaefer*, 509 U.S. 292, 303 (1993) (holding EAJA fee application timely even where no final judgment was ever entered).

substantial justification question despite having been served with the application months earlier.

On June 14, 2000, the CAVC dismissed Mr. Scarborough's fee application on the grounds urged by the government. Cert. App. 22a-25a.

D. Initial Proceedings And Decision In The Federal Circuit

Mr. Scarborough appealed to the Federal Circuit. He contended that EAJA requires only that the application itself, not the no-substantial-justification allegation, be made within the 30-day period. He also argued that the government was estopped from relying on that deadline because it had a lengthy opportunity to bring the alleged defect to Mr. Scarborough's attention if it truly desired the missing information or wanted to avoid delay. In this regard, Mr. Scarborough pointed to CAVC Rule 39(c), which, as noted above, required the government to respond to the fee application within 30 days of service of the application and which, if complied with, would have brought the omission to Mr. Scarborough's attention well before the 30-day period expired.[3]

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[3]As Mr. Scarborough put it below:

> Clearly government's counsel saw the defect in the application and knew that if the government responded within the 30 day requirement of Rule 39, the Veteran would have amended the application to comply with 28 U.S.C. §2412. Rather than show its cards to the Veteran, the government decided to wait until 30 days had passed the final judgment date when it would [in the government's (continued...)

Mr. Scarborough also relied on this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which held that, absent statutory language to the contrary, limitations periods for claims against the federal government, like those involving private defendants, are not jurisdictional bars, but rather are subject to ordinary equitable principles, such as tolling and estoppel. Finally, Mr. Scarborough noted that EAJA mandates an award of fees to a prevailing party "unless" the court finds that the government's position is substantially justified, 28 U.S.C. § 2412(d)(1)(A), and thus EAJA requires the government to carry the burden on the substantial justification issue whenever it wishes to avoid payment of fees to a prevailing party. Therefore, Mr. Scarborough maintained, the requirement should not be seen as jurisdictional.

The Federal Circuit affirmed. The court held that "the thirty-day time limit for submitting a fee application under the EAJA [is] jurisdictional in nature" (Cert. App. 30a), and that this purported jurisdictional bar applied not only to the filing of the application but also to EAJA's four "pleading requirements," including the allegation that the government's

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[3](...continued)
> view] be too late for the Veteran to make a timely supplement to the application.

Brief for Appellant, at 10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000). The government did not deny that it knew of the alleged defect and deliberately waited for the 30-day period to pass, but maintained that "the timing of the Government's filing does not relieve an applicant of the jurisdictional burden to submit a complete and timely EAJA application." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

position lacked substantial justification. Cert. App. 33a. The court acknowledged that its decision conflicted with all other circuit authority, under which a timely-filed EAJA fee application may be supplemented to provide information on those four topics, absent prejudice to the government. *See* Cert. App. 30a-32a.

E. Initial Proceedings Before This Court And The Intervening Decision In *Edelman*

On March 13, 2002, Mr. Scarborough filed his first petition for a writ of certiorari. *See Scarborough v. Principi*, No. 01-1360. Shortly thereafter, this Court decided *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). In that case, plaintiff Edelman had filed a letter with the EEOC claiming that Lynchburg College had discriminated against him in violation of Title VII of the Civil Rights Act of 1964. 535 U.S. at 109. Although the parties disagreed about whether the letter constituted a formal "charge" of discrimination, the Court assumed that it was a "charge" for the purposes of its decision. *See id.* at 110. Edelman and the College agreed that the letter was filed within the relevant limitations period set forth in subsection 706(e)(1) of the Act, 42 U.S.C. § 2000e-5(e)(1), which requires that a charge such as Edelman's be filed within 300 days of the alleged discrimination. Another provision of the same section of the Act, subsection 706(b), 42 U.S.C. § 2000e-5(b), requires that a charge be verified, *i.e.*, "be in writing under oath or affirmation...." Edelman met this requirement as well, but not until after the limitations period of section 706(e)(1) had expired. 535 U.S. at 110.

Edelman relied on an EEOC regulation that provides that a charge is "sufficient" when the EEOC receives from the complaining party "a written statement sufficiently precise to

identify the parties, and to describe generally the action or practices complained of." 535 U.S. at 110 n.2 (quoting 29 C.F.R. § 1601.12(b)). Under that regulation, a charge may be amended to cure "technical defects or omissions, including failure to verify the charge" and such amendments "will relate back to the date the charge was first received." *Id.* The Fourth Circuit held the regulation invalid and Edelman's charge untimely. That court reasoned that because the statute required Edelman's charge to be filed within 300 days and separately required that a charge be verified, it must also require that Edelman's charge be verified within 300 days. *Id.* at 110-11.

This Court reversed. It immediately took issue with the Fourth Circuit's syllogism: "Section 706(b) merely requires verification of a charge, without saying when it must be verified; §706(e)(1) provides that a charge must be filed within a given period, without indicating whether the charge must be verified when filed." *Edelman*, 535 U.S. at 112. The Court then explained why the EEOC's relation-back regulation is an "unassailable interpretation of §706." *Id.* at 118. First, the Court said, applying the limitations period to verification "would ignore the two quite different objectives of the timing and verification requirements." *Id.* at 112. The former puts the employer on notice of a claim before it gets stale and promotes speedy resolution of claims; the latter, by contrast, only seeks to assure that a complainant is "serious enough and sure enough" of the claim to support it under penalty of perjury. *Id.* at 113. Thus, the EEOC simply requires a complaint to be completed and verified before it requires the employer to respond. *Id.* at 115 & n.9.

The Court also noted that it would be "hard pressed" to take a different view in light of its recent ruling in *Becker v. Montgomery*, 532 U.S. 757 (2001). *Edelman*, 535 U.S. at 115.

In *Becker*, the question was whether a timely-filed but unsigned notice of appeal was jurisdictionally defective because an amended notice providing the signature was filed only after the time to appeal had expired. In reversing the Sixth Circuit, *Becker* held that although a notice of appeal, like other district court filings, must be signed, signature is not a jurisdictional requirement. Therefore, so long as the notice itself was timely filed, the amendment containing the signature related back to the original filing. *See Edelman*, 535 U.S. at 116 (discussing *Becker*). *Edelman* noted that permitting relation back in the EEOC administrative context was at least as reasonable as permitting it in the judicial context in *Becker*. *Id.* ("[C]ourts have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing") (citing cases).

On June 17, 2002, this Court granted Mr. Scarborough's first petition, vacated the Federal Circuit's decision, and remanded the case for further consideration in light of *Edelman*. Cert. App. 36a.[4]

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[4]One final point regarding *Edelman* is significant. This Court was urged to decide whether the EEOC's relation-back regulation was entitled to deference as a reasonable interpretation of purportedly ambiguous statutory provisions. However, it did not reach that issue, which allowed it to avoid the complicated question whether the EEOC regulation was the kind of administrative pronouncement entitled to deference. *Compare Edelman*, 535 U.S. at 114 & nn.7-8 (majority opinion), *with id.* at 122-24 (O'Connor, J., concurring in the judgment). Rather, the Court found no ambiguity: "We find the EEOC rule not only a reasonable one, *but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch.*" *Id.* at 114 (emphasis added). Thus, *Edelman*'s holdings arose solely from the statute itself, and the EEOC's (continued...)

F. The Federal Circuit's Decision on Remand

After supplemental briefing before the same panel that heard the original appeal, the Federal Circuit again affirmed dismissal of Mr. Scarborough's fee application, this time in a 2-1 decision, with Chief Judge Mayer dissenting. The panel majority reaffirmed its prior decision, holding that both EAJA's filing deadline *and* the pleading requirements contained in 28 U.S.C. § 2412(d)(1)(B) are "jurisdictional" and therefore must all be met within the 30-day time period. The majority also concluded that *Edelman* was inapposite. Cert. App. 14a.

Chief Judge Mayer disagreed, explaining that *Edelman* "implies that failure to timely include a simple allegation that does not prejudice the opposing party may relate back to a timely filed application." Cert. App. 19a. In addition, he noted that the majority had "unnecessarily narrow[ed] the waiver that Congress intended because the statutory language of ... EAJA does not mandate strict compliance or foreclose supplementation" of the fee application. *Id.* The purpose of the no-substantial-justification allegation, he maintained, was not to erect a jurisdictional bar, but only "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified...." Cert. App. 20a (quoting S. Rep. No. 96-974, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4726, 4992).

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[4](...continued)
regulation has no bearing on the applicability of *Edelman*'s reasoning to Mr. Scarborough's case.

SUMMARY OF ARGUMENT

As the Solicitor General put it just a few months ago: "This Court has made clear that, unless strict compliance with a filing deadline is a prerequisite to the jurisdiction of the court, '[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling.'" Brief for the United States, at 10, in *Kontrick v. Ryan*, No. 02-819 (July 17, 2003) ("U.S. Br. in *Kontrick*") (quoting *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985)). Thus, because an EAJA application is filed in a court that *already* has jurisdiction over the underlying action, EAJA's 30-day time period is a statute of limitations, subject to various equitable doctrines such as relation back and tolling, and it is not, as the Federal Circuit held, an inflexible "jurisdictional" bar. This general rule should not be discarded here because it is the *government* that seeks to take advantage of the purported time bar. Rather, under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), once Congress has waived the government's sovereign immunity (as it has in EAJA), limitations periods that run in favor of the government, like those involving private parties, are not jurisdictional unless Congress has explicitly so provided.

Applying those equitable doctrines, the decision below should be reversed for two reasons. First, Mr. Scarborough's amendment alleging that the government's position was not substantially justified relates back to his timely-filed fee application under the standard set by Federal Rule of Civil Procedure 15(c)(2) and under this Court's recent decisions in *Edelman v. Lynchburg College,* 535 U.S. 106 (2002), and *Becker v. Montgomery*, 532 U.S. 757 (2001). Second, the 30-day period should have been equitably tolled. Mr. Scarborough "actively pursued his judicial remedies by filing a [purportedly]

defective pleading during the statutory period" and the government's failure to respond to Mr. Scarborough's fee application as required by the applicable CAVC rule induced Mr. Scarborough "into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3

Even if the 30-day time limit *is* an absolute bar to consideration of an *untimely* fee application, the Federal Circuit nevertheless erred in affirming dismissal of Mr. Scarborough's *timely* fee application because the 30-day limit is not a jurisdictional bar to a timely, but incomplete application. Such an application may be amended to provide the missing information, absent prejudice to the government, as every circuit to have addressed the question, except for the Federal Circuit, has held. *See, e.g., Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985). The Federal Circuit's aberrant view is at odds with this Court's decision in *Becker*, 532 U.S. 757, which held that an amendment supplying a missing signature on a timely-filed notice of appeal must be allowed even after the time to appeal has expired, if the amendment is filed promptly after the defect is brought to the appellant's attention.

The Federal Circuit also erred on another ground. EAJA's 30-day period is contained in the same sentence as three of EAJA's pleadings requirements, but not in the next sentence, which concerns the no-substantial-justification allegation at issue here. *See* 28 U.S.C. § 2412(d)(1)(B). The latter sentence contains no limitations period at all. Thus, the 30-day limit does not apply to the requirement that an EAJA applicant allege that the government's position was not substantially justified. Mr. Scarborough's fee application was therefore timely in all respects.

ARGUMENT

In the pages that follow, Mr. Scarborough first argues that EAJA's 30-day time limit is not "jurisdictional" and that, therefore, equitable doctrines, such as relation back and tolling, apply whether or not the application is filed on time. Mr. Scarborough then argues that even if the 30-day limit is an absolute bar to an *untimely* fee application, it is does not bar *timely* but incomplete fee applications that are promptly amended to supply the missing information or allegation. Finally, Mr. Scarborough shows that EAJA contains no limitations period at all as to the requirement that an EAJA applicant allege that the government's position was not substantially justified.

We recognize that, by proceeding in this order, we are presenting narrower bases for resolving this case after the broader argument. We do so for three reasons. First, by addressing the question whether EAJA's 30-day limit is "jurisdictional," the Court would confront what we believe is the Federal Circuit's fundamental error in this case — its belief that the government is entitled to special treatment when it raises a limitations defense, an assumption that is inconsistent with this Court's decision in *Irwin* and susbequent decisions. Second, by addressing this overarching issue, the Court will have the best opportunity to test the Federal Circuit's ruling against that of *Edelman v. Lynchburg College,* 535 U.S. 106 (2002), the case that prompted the Court's remand when Mr. Scarborough first petitioned the Court last year. 536 U.S. 920 (2002). Finally, a ruling that this Court meant what it said in *Irwin* will preempt, in similar cases under EAJA and other statutes, further mischief and wasteful litigation of the kind that occurred in Mr. Scarborough's case and in the wake of the decisions below. *See* Cert. Pet. 19-20 & n.6 (citing cases);

Cert. Reply 10 (same); *see also Billey v. Principi*, 2003 WL 21190651 (Vet. App. 2003).

I. EAJA'S 30-DAY TIME LIMIT IS NOT JURISDICTIONAL, BUT RATHER IS SUBJECT TO EQUITABLE DOCTRINES SUCH AS RELATION BACK AND TOLLING, UNDER WHICH MR. SCARBOROUGH'S FEE APPLICATION SHOULD HAVE BEEN CONSIDERED TIMELY AND COMPLETE.

A. EAJA's 30-Day Limitations Period Is Not Jurisdictional.

The Federal Circuit's most basic error was that it treated EAJA's 30-day time limit as "jurisdictional," *i.e.*, as an absolute time bar not subject to any exceptions. Thus, under the Federal Circuit's view, EAJA requires dismissal of an untimely or incomplete application without any inquiry into the circumstances of the submission, the opposing party's conduct, or whether prejudice would result if an exception were made. That view cannot be reconciled with decisions of this Court or EAJA's text.

The Federal Circuit's understanding is flatly at odds with *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). *Irwin* is the leading case on the construction of statutes of limitations that run in favor of the federal government, yet the Federal Circuit did not cite, much less discuss, *Irwin* in either of its opinions below. In *Irwin*, the Court held that 42 U.S.C. § 2000e-16(c) — which allowed an employee aggrieved by final action of the EEOC 30 days to file a Title VII action in federal court — is not jurisdictional, but rather operates like a statute of limitations subject to equitable principles, such as

tolling, waiver, and estoppel. The Court concluded, as a general matter, that once Congress has waived the government's sovereign immunity (as it has in EAJA), there is a rebuttable presumption that those equitable principles apply to the same extent as in a suit among private parties, and that, therefore, limitations periods in actions against the government are not jurisdictional unless Congress has explicitly so provided. *Id.* at 96; *see also Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (rejecting special accrual rule where federal government is defendant and noting "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties") (quoting *Irwin*, 498 U.S. at 95).

The *Irwin* presumption applies here because Congress did not provide, in EAJA's text, that the 30-day limit is jurisdictional. In proceedings below, the government adverted to one — and only one — textual justification for the notion that EAJA's filing period is jurisdictional: The statute says that the fee application "shall" be filed within 30 days of final judgment in the action. *See, e.g.*, Supp. Brief for Resp.-Appellee, at 7, in *Scarborough v. Principi*, No. 00-7172 (Fed. Cir. filed Nov. 12, 2002). But that argument was specifically considered and rejected in *Irwin*. The Court held that a statutory limitations period running in favor of the government is not jurisdictional simply because it uses assertedly mandatory language such as "shall." That approach, the Court held, "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Irwin*, 498 U.S. at 95.[5]

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[5]As noted in *Irwin*, Congress is free to erect a jurisdictional time bar in suits against the government if it so chooses. Under 26 (continued...)

But that is not all. In this case, the *Irwin* presumption is accompanied by important textual reasons why the statutory time limit is not jurisdictional. First, EAJA's provision containing the 30-day period, 28 U.S.C. § 2412(d)(1)(B), "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). More important, where EAJA does "speak in jurisdictional terms," it forcefully favors Mr. Scarborough's position. The first sentence of EAJA provides that fees shall be awarded to the prevailing party "in any civil action ... brought by or against the United States *in any court having jurisdiction of that action.*" 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The highlighted language recognizes that a court entertaining an EAJA application *already* has jurisdiction, a truism that the government nevertheless tries to escape. *See* Opp. 16 (stating that an "incomplete EAJA application [fails to] confer jurisdiction on the district court"). If the term "jurisdictional" is to serve any purpose, other than as a legalistic way of saying "you lose," it should, as its name indicates, apply, if at all, only where the filing at issue establishes subject matter *jurisdiction* in the court in which it is filed.

The Court made this point in *Zipes*, 455 U.S. at 393,

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[5](...continued)
U.S.C. § 6213(a), a taxpayer seeking to challenge an IRS tax deficiency notice must file a petition in the United States Tax Court within 90 days after the notice is mailed to the taxpayer, and "[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed ...." Courts have held that this deadline is "jurisdictional." *See, e.g., Tadros v. Comm'r*, 763 F.2d 89, 91 (2d Cir. 1985).

indicating that for a statutory time limit to be "jurisdictional" it must be "a jurisdictional prerequisite to suit in federal court." And it reiterated this view more recently in *United States v. Cotton*, 535 U.S. 625 (2000), where the Court first lamented its sometimes loose use of the term "jurisdictional," and then made clear "what the term means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case.'" *Id.* at 630 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (emphasis in original)); *see also Luna v. Dept. of HHS*, 948 F.2d 169, 173 (5th Cir. 1991) (rejecting government's argument that EAJA's time limit is jurisdictional and indicating that district court's jurisdiction was founded not on EAJA, but on Social Security Act, which was basis for plaintiff's claim on merits); *Dunn v. United States*, 775 F.2d 99, 103 (3d Cir. 1985) (rejecting position accepted by the Federal Circuit below and noting that "[w]e are, of course, dealing with an issue of statutory construction. It is not helpful in approaching that task to attach labels such as 'jurisdictional' to the actions of Congress before first examining the language of the statute and the context in which that language was used.").[6]

Mr. Scarborough's position is also supported by case

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[6]As noted above (at 16), the government made this very point in *Kontrick v. Ryan*, No. 02-819 (argued Nov. 3, 2003), where it appears as amicus because "the United States is a creditor in many bankruptcies." U.S. Br. in *Kontrick*, at 1. The question in *Kontrick* is whether the time deadline for objecting to a debtor's discharge under Bankruptcy Rule 4004(a) — which provides that an objection "*shall* be filed no later than 60 days after the first date set for the meeting of creditors" — is jurisdictional. We agree with the government's position in *Kontrick* that a filing period cannot be "jurisdictional" if, by its terms, it "does not limit *jurisdiction* to those cases in which there has been a timely filing." U.S. Br. in *Kontrick*, at 13 (quoting *Zipes*, 455 U.S. at 393) (emphasis added).

law under Federal Rule of Civil Procedure 54(d)(2), which sets procedures for attorney's fee motions in federal district court. Of relevance here, Rule 54(d)(2)(B) states that "[u]nless otherwise provided by statute or order of the court, the motion *must* be filed no later than 14 days after entry of judgment." This Rule effectively sets the limitations period for dozens of federal fee-shifting statutes, which generally do not have their own limitations periods, with the notable exception of EAJA. Despite its use of "must," which is, if anything, more demanding than EAJA's "shall," courts have consistently held that Rule 54(d)(2)(B)'s filing period is not jurisdictional and may be waived by the opposing party and relaxed by the court. *See, e.g., Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996); *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 308-09 (7th Cir.1995); *see also Soberay Mach. & Equipment Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 770 (6th Cir. 1999) (same for objections to costs under Rule 54(d)(1)). These decisions reflect the lower federal courts' understanding that it is nonsensical to deem *jurisdictional* a limitations period for a filing that does not invoke a court's *jurisdiction*, *i.e.*, the power to decide a case in the first instance.

In this case, Mr. Scarborough properly invoked the CAVC's jurisdiction in 1998 when he filed his disability appeal, and he was not required, when filing his EAJA application, to invoke that jurisdiction again. That fact alone differentiates this case from cases involving notices of appeal upon which the Federal Circuit relied (Cert App. 16a-17a), and it distinguishes EAJA's limitations period from the statutory deadline for initiating a tax deficiency action (discussed *supra* note 5): Both a notice of appeal and a Tax Court petition give a court authority over a case in the first instance. *See also* U.S. Br. in *Kontrick*, at 14 (distinguishing notice of appeal on same

ground). An EAJA fee application does not.[7]

B. The Amendment To Mr. Scarborough's Fee Application Should Have Been Allowed Under The Relation Back And Equitable Tolling Doctrines.

1. Mr. Scarborough's Amendment Relates Back To His Timely-Filed Fee Application.

In most cases involving whether a statutory deadline should be subject to an exception, the claimant has filed late and the issue is whether the circumstances permit the limitations period to be tolled or whether the party seeking dismissal has waived enforcement of the deadline or should be estopped from enforcing it. This case is different because Mr. Scarborough filed his fee application on time. Thus, because the 30-day period is not jurisdictional (as demonstrated

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[7]Despite the *Irwin* presumption and EAJA's text, a number of circuit courts, in addition to the Federal Circuit, have held that EAJA's 30-day limit for filing the fee application (though not for meeting EAJA's pleading requirements) is jurisdictional. *See* Cert. App. 6a (citing cases). None of those cases even cites *Irwin*, and most of them rely on pre-*Irwin* precedents that simply assume that the government is entitled to special treatment when invoking a time bar — exactly the opposite approach from that taken in *Irwin*. *See, e.g., Yang v. Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994) (relying on *Columbia Mfg. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983)); *Buck v. Sec'y of HHS*, 923 F.2d 1200, 1202 (6th Cir. 1991) (relying on *Allen v. Sec'y of HHS*, 781 F.2d 92, 94 (6th Cir. 1986)). *Contra Luna*, 948 F.2d at 173; *see also Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992) (EAJA's 30-day period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same).

immediately above), the Court can resolve this case most easily by asking whether Mr. Scarborough's amendment alleging that the government's position was not substantially justified relates back to his timely-filed fee application. Mr. Scarborough's amendment easily meets the standards for relation back as applied in civil litigation generally and in the decisions of this Court.

a. In civil litigation, an action is commenced by the filing of a complaint, which must include "a short and plain statement" of the basis for the court's subject matter jurisdiction and "of the claim showing that the pleader is entitled to relief," plus a demand setting forth the relief sought by the plaintiff. Fed. R. Civ. P. 8(a). Thus, in the simple complaint for negligence described on Form 9 of the Federal Rules of Civil Procedure, in which a car driven by the defendant runs into the plaintiff-pedestrian, the plaintiff must allege the basis for federal jurisdiction, the basic facts, and the legal basis for the claim (negligence), and she must demand damages or some other relief. *See* Fed. R. Civ. P., Form 9.

Much as an EAJA applicant is expected to allege that he or she is a prevailing party within 30 days of final judgment, a civil plaintiff is expected, of course, to meet the Federal Rules' pleading requirements within the applicable statute of limitations. However, *as long as the initial complaint is filed on time*, a failure to properly set forth the claim that the plaintiff wishes to pursue is not generally fatal. To the contrary, an amendment filed after expiration of the limitations period "relates back" to the initial pleading if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [timely-filed] pleading." Fed. R. Civ. P. 15(c)(2).

Under this standard, "amendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading . . . will relate back," Wright, et al., 6A *Federal Practice and Procedure* § 1497, at 74 (2d ed. 1990), as will amendments to cure defective statements of *subject matter jurisdiction*, *id.* at 80, one of the basic pleading requirements imposed by Federal Rule of Civil Procedure 8(a). The key question is whether the amendment's alteration of, or addition to, the original pleading is "so substantial" that the original pleading cannot be said to have provided the defendant "adequate notice" of the amended claim. *Id.* at 79. If, however, notice is adequate, the amendment relates back to the date of the original complaint.

As this Court has put it, "[t]he rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3 (1984); *see also Schiavone v. Fortune*, 477 U.S. 21 (1986) (linchpin of Rule 15(c) is notice of claim within the limitations period); 1966 Adv. Comm. Note to Rule 15(c) (in determining whether amendment relates back, question is whether adverse party "was put on notice of the claim within the stated [limitations] period"). This focus on notice, which promotes fairness to the adverse party, is essentially the same standard embraced by the Third and Eleventh Circuits for allowing amendments to a timely-filed EAJA application: *Absent prejudice to the government*, an application may be supplemented after the 30-day period has expired to meet the statute's pleading requirements. *See Dunn v. United States*, 775 F.2d 99 (1985); *Singleton v. Apfel*, 231 F.3d 853 (2000); *accord United States v. True*, 250 F.3d 410, 418 n.5 (6th Cir. 2001).

Thus, if, in the car accident case described on Form 9, the plaintiff amends after expiration of the limitations period to provide the date on which the accident occurred, or to claim mental as well as physical injury, or to supply the previously omitted basis for federal subject matter jurisdiction, *i.e.*, to supply an allegation that is genuinely "jurisdictional," those amendments will relate back because they provide information arising from a transaction or occurrence of which the defendant has already been notified. *See Edelman v. Lynchburg College,* 535 U.S. 106, 115-16 (2002). Under this standard, it is undisputed that Mr. Scarborough's amendment stating that the government's position was not substantially justified arises out of the same "conduct, transaction, or occurrence" that is the subject of the initial fee application — namely, the claim for fees arising from the CAVC's disability determination.

Of particular relevance here, amendments that do nothing more than modify a party's *legal* allegations almost invariably relate back. "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." Wright, et al., 6A *Federal Practice and Procedure* § 1497, at 94-95 (citing cases). Indeed, even an amendment that presents "an entirely new claim for relief" relates back provided that the amendment, as a factual matter, meets Rule 15(c)(2)'s "conduct, transaction, or occurrence" standard. *Id.* at 99; *accord Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-81 (1945).

This line of authority supports Mr. Scarborough's position here because his omission was not that he failed to plead a *factual* basis for the no-substantial-justification allegation, which EAJA does not require, but simply that he did

not plead a particular formulaic legal conclusion. Courts have consistently allowed relation back where the only defect is an alleged failure to plead a legal conclusion. *See Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 712 (E.D. Pa. 1976) ("The failure to attach a legal conclusion, such as sexual discrimination, to the factual occurrences complained of has been interpreted to be a 'technical defect' . . . and, as such, an amended charge remedying the defect relates back to the original filing date."); *accord Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 202 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970). In sum, under the Rule 15(c)(2) formulation, even assuming that the no-substantial-justification allegation was required to have been made within the 30-day period, Mr. Scarborough's amendment should have been allowed.

b. Mr. Scarborough acknowledges that Rule 15 applies here only indirectly, because it concerns amendments to "pleadings," *see* Fed. R. Civ. P. 15(a), and a fee application is not a "pleading" under the Federal Rules. *See* Fed. R. Civ. P. 7(a). However, an attorney's fee application, like a complaint, a counterclaim, and other pleadings, *see id.*, is a request for affirmative relief, and, therefore, the Court should be guided here by Rule 15 principles.

Applying the principles embodied in Rule 15 to a fee application is fully consistent with this Court's precedents, which have employed relation back even where Rule 15 was not expressly applicable. Prior to the promulgation of the Federal Rules, the Court embraced the relation back doctrine and expressly allowed a plaintiff to amend his complaint to add a new legal theory based on facts alleged in the original claim. *See New York Central & Hudson River Railroad Co. v. Kinney*,

260 U.S. 340 (1922); *see also* 1937 Adv. Comm. Note to Rule 15(c) (noting that relation back doctrine was "well recognized" prior to Federal Rules). And, quite recently, in *Edelman*, 535 U.S. 106, the Court interpreted Title VII's provisions regarding the filing of EEOC discrimination charges — which are not "pleadings" — to permit relation back. In construing the statute, the Court relied in large part on state and federal court cases embracing the relation back doctrine, 535 U.S. at 116, explaining that "if relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency." *Id.*; *see also id.* at 116 n.10 (noting parallel to Rule 15(c)). Moreover, *Edelman* referred to this Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), discussed below (at 35-36), as involving the doctrine of "relation back," *Edelman*, 535 U.S. at 116, even though the document at issue in *Becker* — a notice of appeal — is not a Rule 7(a) "pleading."

In sum, if the Rule 15(c)(2) standard "is a good rule" for complaints and other pleadings that come at the beginning of a case, "it would be passing strange to call it bad for" a fee application that comes only after the parties have litigated a case to judgment on the merits. *Id.*

2. Mr. Scarborough's Amendment Should Have Been Accepted Under Equitable Tolling Principles.

Non-jurisdictional statutes of limitations are subject not only to the relation back doctrine, but to equitable tolling principles as well. *Irwin* discussed two distinct bases for establishing equitable tolling: "[1] where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [2] where the complainant has been induced or tricked by his adversary's

misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3 (citing cases); *see also Young v. United States*, 535 U.S. 43, 49-50 (2001) (reiterating *Irwin*'s tolling categories and noting that they are not exclusive). Both apply here.

a. Tolling Involving A Timely-Filed, But Defective Pleading. The first of *Irwin*'s tolling categories — involving a timely-filed, but defective pleading — is the easier one to resolve in this case because it only requires consideration of objective, uncontroverted facts. *According to the government*, Mr. Scarborough "fil[ed] a defective pleading during the statutory period," and it cannot be disputed that Mr. Scarborough — who repeatedly filed his fee application *before* the limitations began to run — "actively pursued his judicial remedies" under EAJA. In other words, even assuming that omitting the no-substantial-justification allegation was a defect, it is undisputed that Mr. Scarborough's otherwise complete application was filed "during the statutory period." And Mr. Scarborough's "active pursuit" of his EAJA remedy is further demonstrated by his amendment supplying the missing allegation immediately after the purported omission was brought to his attention. *See Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (under *Irwin*, "equitable tolling is available where a plaintiff has actively pursued judicial remedies but filed a defective pleading, as long as the plaintiff has exercised due diligence").

This tolling principle is, in effect, the rule adopted for EAJA's statute of limitations by all the courts of appeals to have addressed the question other than the Federal Circuit. Those courts hold that an application filed "during the statutory period" that is "defective" because it omits some of the allegations or information required by 28 U.S.C. §

2412(d)(1)(B) can be cured at a later date, asbent prejudice to the government. *See True*, 250 F.3d 410; *Singleton,* 231 F.3d 853; *Dunn*, 775 F.2d 99. That tolling principle is also quite similar to the relation back doctrine as applied in *Becker v. Montgomery*, where this Court emphasized that the plaintiff had acted with due diligence by filing the required amendment to his notice of appeal shortly after the defect was brought to his attention. 532 U.S. at 761, 764. For these reasons, the 30-day deadline was tolled by the filing of the fee application, and the CAVC was required to accept as timely the amendment to Mr. Scarborough's fee application.

b. Tolling Based On An Adversary's Inducement Or Trickery. Mr. Scarborough is also entitled to have the 30-day limitations period tolled on the ground that the pleading defect, if any, was induced by the government's misconduct. As noted earlier, Mr. Scarborough submitted his fee application to the CAVC and served it on government counsel *before the 30-day period even started to run*. If the government had complied with CAVC Rule 39(c), which required it to answer the fee application within 30 days of *service* (*see* App. 1a), the alleged defect would have been brought to Mr. Scarborough's attention well before EAJA's 30-day period expired.

In the courts below, the government never denied that it learned of the omission at the time of service and simply waited for the 30-day period to expire. The government did maintain that it "was in compliance with all applicable [CAVC] rules." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. filed Jan. 9, 2001). That is not correct. On November 1, 2001, after the CAVC proceedings in this case, the CAVC amended Rule 39(c) to state that the government shall respond to an EAJA application within 30 days after the application is "filed" (not

"served," as was previously the case). In comments accompanying the amendment, the CAVC explained its purpose: "Subsection (c) is amended (in light of the premature submission in some cases of EAJA applications prior to judgment becoming final), so as to start the Secretary's 30-day response time from the Court's filing of the EAJA application, *rather than upon service of an application on the Secretary, which occurs at the time when a premature application is submitted.*" CAVC Misc. Order No. 8-01 (Nov. 1, 2001) (emphasis added) (attached at App. 4a). Therefore, when Mr. Scarborough served his application in 1999, the government did *not* comply with then-applicable CAVC Rule 39(c). This non-compliance indicates that the government knowingly caused Mr. Scarborough to become ensnared in a procedural trap by waiting to respond until after the 30-day period expired, in contravention of Congress's expressed desire that EAJA's limitations period not be employed as a "trap for the unwary." *See* H.R. Rep. No. 99-120, pt. 1, at 18 n. 26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146; H.R. Rep. No. 99-120, pt. 2, at 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156.

The government has justified the decision below on the ground that, no matter what the circumstances or how harsh the consequences, EAJA requires "litigants to turn square corners and make a timely filing." Opp. in No. 01-1360 at 8. As shown above, this view of EAJA's limitations period as absolute and inflexible is wrong for a number of reasons. But at the very least, it is intolerable for the government to be permitted to impose a time bar on the theory that EAJA requires "litigants to turn square corners," where the problem would have been avoided if the government itself had "turn[ed] square corners" and followed the applicable procedural rule for serving its response.

II. EAJA'S 30-DAY LIMITATIONS PERIOD IS NOT A "JURISDICTIONAL" BAR TO A TIMELY-FILED, BUT INCOMPLETE, FEE APPLICATION.

Part I above shows that EAJA's 30-day time limit is not a jurisdictional bar in any circumstance. However, even if the Court disagrees, the decision below should be reversed because, at the very least, the 30-day limit is not a jurisdictional bar to a timely but incomplete fee application.

1. As the Third, Sixth, and Eleventh circuits have held, even if the 30-day limit is a jurisdictional bar to an application that is not filed on time, it is not a jurisdictional bar to a *timely* application that fails to meet all of EAJA's pleading requirements before the 30-day period expires. Rather, if the fee application itself is timely, it may be amended later to satisfy the pleading requirements, absent prejudice to the government. *See United States v. True*, 250 F.3d 410 (6th Cir. 2001); *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000); *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985).

The leading case is the Third Circuit's decision in *Dunn*, 775 F.2d 99, in which the district court had dismissed, as "jurisdictionally" defective, a fee application that did not initially include the specific amount requested, an itemized statement of attorney time expended, or the rate at which fees were to be computed, even though the fee applicant had supplied the missing information shortly after the 30-day period had expired. *Id.* at 101-02. *Dunn* explained that section 2412(d)(1)(B) contains two separate requirements — a deadline for filing and a pleading standard — and that "[t]he two requirements serve different purposes." *Id.* at 103. Although filing the fee claim within a certain time period serves the

government's interest in finality and reliance, *id.* at 103-04, the court noted that "once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied." *Id.* at 104; *see also Edelman*, 535 U.S. at 112 (superimposing the statutory time deadline for filing an EEOC charge on the distinct requirement that a charge be verified "would ignore the two quite different objectives of the timing and verification requirements").

Dunn went on to explain that "[w]hat remains [after the filing of a timely EAJA application] is the fleshing out of the details, and the government has pointed out no governmental interest which is in any way affected by the fact that the details of the fee claim came shortly after the claim was filed." 775 F.2d at 104; *accord True*, 250 F.3d at 421; *Singleton*, 231 F.3d at 858. Thus, because there was no conceivable reason why Congress would have wanted EAJA's pleading requirements to be jurisdictional, *Dunn* concluded that a court must permit supplementation of the fee application after expiration of the 30-day filing period, absent prejudice to the government. *Dunn*, 775 F.2d at 104; *see Singleton*, 231 F.3d at 858.

The fundamental difference between the timely filing of an EAJA claim and its litigation — "the fleshing out of the details," *Dunn*, 775 F.2d at 104 — is particularly clear in Mr. Scarborough's case because EAJA only requires that an applicant *allege* a lack of substantial justification; the "details" are necessarily litigated later and only if the government raises the substantial justification defense. Put otherwise, the government's attempt to equate EAJA's filing and pleading requirements is especially weak in this case because omitting the no-substantial-justification allegation could not possibly disturb the government's interest in finality, and the government has not argued otherwise.

2. This Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2002), provides Mr. Scarborough further support. That case posed the question whether the Sixth Circuit had properly dismissed, as jurisdictionally defective, Mr. Becker's timely-filed, but unsigned, notice of appeal. A timely notice of appeal is "jurisdictional" — that is, it is a prerequisite for invoking the jurisdiction of a federal court of appeals, *id.* at 765 — and, as its name connotes, its purpose is to put the appellee *on notice* that appellate review has been sought. However, *signing* the notice does not serve that purpose, the Court held, but rather is "aimed at stemming the urge to litigate irresponsibly." *See Edelman*, 535 U.S. at 116 (explaining *Becker*'s rationale). Thus, because Mr. Becker filed an amended notice containing the required signature promptly after the omission was brought to his attention, the amendment should have been accepted, and the Sixth Circuit erred in dismissing the appeal. *See Becker*, 532 U.S. at 768.

The parallels between Mr. Scarborough's case and *Becker* are difficult to ignore. Even if one assumes (wrongly, in our view) that EAJA's 30-day *filing* deadline is "jurisdictional," that deadline — and only that deadline — is analogous to the time period for *filing* a notice of appeal in *Becker*. On the other hand, EAJA's *pleading* requirements, particularly its technical requirement that the applicant allege that the government's position was not substantially justified, are analogous to the *non-jurisdictional* signature requirement in *Becker*, because both go to the form or content of the document and not to its filing, and neither is central to the policy behind the limitations period: putting the adverse party on notice of the claim. Finally, just as Mr. Becker promptly provided his signature after the omission was brought to his attention, Mr. Scarborough provided the no-substantial-justification allegation immediately after he learned of the

purported defect — insuring that no prejudice would result, assuming any prejudice were possible.[8]

III. THE DECISION BELOW SHOULD BE REVERSED BECAUSE THE 30-DAY LIMIT DOES NOT APPLY TO THE NO-SUBSTANTIAL-JUSTIFICATION ALLEGATION.

Even assuming that EAJA's limitations period can be an absolute bar to fee applications that, in some respects, do not meet 28 U.S.C. § 2412(d)(1)(B)'s pleading requirements within 30 days of final judgment, the decision below should nevertheless be reversed. The Federal Circuit held that the 30-day limit applies to *all four* pleading requirements contained in section 2412(d)(1)(B). *See* Cert. App. 4a, 5a. But that is not what the statute says. Section 2412(d)(1)(B) contains two distinct and differently-worded sentences. The first sentence —

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[8] *Becker* and *Edelman* provide one further parallel to this case that applies to the no-substantial-justification allegation but not to EAJA's other pleading requirements. The signature requirement at issue in *Becker*, like the verification requirement at issue in *Edelman*, is intended to discourage irresponsible litigation. *See Edelman*, 535 U.S. at 116. It is difficult to discern a purpose for requiring an EAJA fee applicant to allege that the government's position lacked substantial justification, given that the government has the burden of proof on the substantial justification issue. However, it is possible that Congress wanted the no-substantial-justification allegation to serve a purpose similar to that which gave rise to the signature and verification requirements at issue in *Becker* and *Edelman*: to encourage the fee applicant to ponder the government's position on the merits before filing the application. If that is so, then the remedy here should be the same as in *Becker* and *Edelman*: An amendment supplying the missing allegation must be allowed, absent prejudice to the government.

which contains the 30-day filing deadline for an "application" — says that the "application" shall contain statements concerning prevailing-party status, the applicant's eligibility (net worth), and the amount of fees sought. The next sentence — which does not include any reference to the 30-day period or to the "application" — says that the "party shall also allege that the position of the United States was not substantially justified." *See* 28 U.S.C. § 2412(d)(1)(B). Thus, EAJA requires only that the party allege that the government's position lacked substantial justification — which Mr. Scarborough did in this case — and it does not require that it be done within 30 days of final judgment or in the fee application itself. This conclusion follows from the principle of statutory construction that "presume[s] that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (internal quotation marks and citation omitted).

This view — that EAJA's 30-day limitations period does not apply to the no-substantial-justification allegation — is further supported by this Court's decision in *Edelman v. Lynchburg College*, which relied on the same principle of statutory construction in a circumstance highly analogous to that presented here. As explained in detail above (at 12-14), *Edelman* held that the requirement that an EEOC charge be filed within 300 days of the alleged discrimination, contained in one subsection of Title VII, did not apply to the requirement that the charge be verified, contained in another subsection that has no limitations period. Thus, the Court held, verification of a charge may occur after the filing period has expired and relate back to a timely filed unverified charge. *Edelman*, 535 U.S. at 112-16. Just as in *Edelman*, EAJA's 30-day filing requirement, contained in the first sentence of 28 U.S.C. § 2412(d)(1)(B),

should not be superimposed on the no-substantial-justification allegation requirement, which is contained in the second sentence and has no deadline at all.[9]

In addition to the powerful analogies between this case and *Edelman*, a distinction between the two cases also supports Mr. Scarborough's position. In *Edelman*, the statutory verification requirement of 42 U.S.C. § 2000e-5(b) applied to a "charge" of discrimination. Therefore, verification could plausibly, if not convincingly, be considered one of the characteristics "charges" must have in advance of the statutory deadline for filing them. *See Edelman*, 535 U.S. at 120 (O'Connor, J., concurring in the judgment). Here, by contrast, the second sentence of section 2412(d)(1)(B) does not refer to the "application" at all but only states what a "party" must allege. This point underscores that the second sentence does not describe a characteristic of the initial fee "application" that must be filed within 30 days of final judgment.

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[9]The Solicitor General filed a brief in *Edelman* arguing that the limitations period for filing an EEOC charge did not apply to verification of that charge. His argument there cannot be squared with his position here. As the Solicitor General put it:

> Section 706(b), which contains the verification requirement, does not refer to the time limits in Section 706(e), and Section 706(e) is silent as to whether the "charge" that must be filed within 300 days of the alleged discriminatory act must also be verified *at the time of filing*. While there is a statute of limitations for filing a charge, there is simply no statute of limitations for verification.

Brief for the United States and the EEOC, at 10, in *Edelman v. Lynchburg College*, No. 00-1072 (Aug. 30, 2001) (emphasis in original).

The government's only response to the plain language of section 2412(d)(1)(B) is to speculate that Congress placed what an application must "show" in a different sentence from what a party must "allege" in "an effort to preserve parallel sentence structure." *See, e.g.*, Opp. 8 n.1. That argument makes no sense because even if it were grammatically difficult to list all four pleading items in the first sentence of 28 U.S.C. § 2412(d)(1)(B), that would not explain why Congress did not include a 30-day time period in the second sentence of that section if it wanted that sentence to bear the meaning given to it by the government. In any event, use of two separate sentences was not grammatically necessary nor was use of one sentence the least bit difficult. If Congress had wanted to merge the two sentences into one, to subject the no-substantial-allegation requirement to the 30-day limit, it could have done so very easily, just as the Solicitor General did twice in its brief in opposition. Opp. 8, 15. The Federal Circuit also merged both sentences into one without grammatical incident. Cert. App. 4a.

Given EAJA's plain language, the Court need not inquire why Congress exempted the no-substantial-justification allegation from the 30-day limitations period. But there is good reason why Congress might have done so. As noted earlier, EAJA places the burden of demonstrating substantial justification on the government, not on the fee applicant to demonstrate a lack of substantial justification. *See* 28 U.S.C. § 2412(d)(1)(A) (fees "shall" be awarded to the prevailing party, "unless" the court finds the position of the government was substantially justified). Thus, the government must carry that burden to avoid payment of fees to a prevailing party. *See, e.g., True*, 250 F.3d at 419 n.7 (citing cases); H.R. Rep. No. 120, pt. 1, at 11, 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 140, 141; H.R. Rep. No. 96-1418, at 10-11, 16, 18 (1980), *reprinted in*

1980 U.S.C.C.A.N. 4989, 4995, 4997; *see also* Cert. App. 20a ("The legislative history pointedly reveals that this simple allegation was included 'to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified.'") (quoting S. Rep. No. 96-974, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4726, 4992) (Mayer, C.J., dissenting). In light of that fact, it is difficult to believe that Congress would, in 28 U.S.C. § 2412(d)(1)(B), have erected an absolute bar against applicants who do not make the no-substantial-justification allegation in their initial filing — a bar that would impose serious harm on otherwise eligible fee applicants without any countervailing benefit.

CONCLUSION

The Federal Circuit's decision should be reversed and the case remanded for proceedings on the merits of Mr. Scarborough's fee application.

Respectfully submitted,

Brian Wolfman
(Counsel of Record)
Scott L. Nelson
Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Peter J. Sarda
Wallace, Creech & Sarda, L.L.P.
P.O. Box 12065
Raleigh, NC 27605
(919) 782-9322

November 2003

Counsel for Petitioner
Randall C. Scarborough

APPENDIX

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
RULE 39
[in effect in August 1999]

a) Time for Filing. An application pursuant to 28 U.S.C. § 2412 for award of attorney fees and other expenses in connection with an appeal must be filed with the Clerk within 30 days after this Court's judgement becomes final. See also 28 U.S.C. § 2412(d)(2)(G) and 38 U.S.C. § 7291(a). Such an application may be filed by facsimile sent to the Clerk of the Court.

b) (Rescinded)

c) Response. Within 30 days after service of the application, the Secretary shall file and serve a response, stating which elements of the application are not contested and explaining the Secretary's position on those elements which are contested.

d) Reply. Within 30 days after service of the Secretary's response, the applicant may file and serve a reply addressing those matters contested by the Secretary.

e) Appendices. The parties shall file as appendices to the application, response, and reply those relevant papers which are not already before the Court.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MISC. NO. 8-01

IN RE: RULES 39, 41, AND 42 OF THE RULES OF PRACTICE AND PROCEDURE

Before KRAMER, *Chief Judge,* and FARLEY, HOLDAWAY, IVERS, STEINBERG, and GREENE, *Judges*

ORDER

Pursuant to the authority of 38 U.S.C. §§ 7263(b) and 7264(a) and consistent with 28 U.S.C. § 2071 (b) and (e), the Court has determined that there is an immediate need to amend Rules 39(a), (b), and (c), 41(b), and 42 of its Rules of Practice and Procedure. Accordingly, it is

ORDERED that the attached amendments to Rule 39(a), (b), and (c), 41(b), and 42 are published and will be effective on November 9, 2001. It is further

ORDERED that public comment on the amendments made by this order is invited. Such comment must be submitted to the Clerk of the Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004, by December 28, 2001.

DATED: November 1, 2001 BY THE COURT:

KENNETH B. KRAMER
Chief Judge

Attachments

ATTACHMENT TO MISCELLANEOUS ORDER NO. 8-01

RULE 39. ATTORNEY FEES AND EXPENSES

(a) Time for filing. An application pursuant to 28 U.S.C. § 2412 for award of attorney fees and/or other expenses in connection with an appeal or petition must be filed with the Clerk within 30 days after this Court's judgment becomes final, which occurs 60 days after entry of judgment under Rule 36 or, consistent with Rule 41(b), upon the issuance of an order on consent dismissing, terminating, or remanding a case. See Rule 25 (Filing and Service).

(b) Supplemental application. An appellant or petitioner whose application described in subsection (a) of this rule has been granted in whole or in part may, not later than 30 days after the Court action granting such application, file a supplemental application for attorney fees and other expenses in connection with the submission or defense of such subsection (a) application. See Rule 25.

(c) Response. Within 30 days after the date on which an application described in subsection (a) or a supplemental application described in subsection (b) is filed, the Secretary shall file and serve a response to the application or supplemental application, stating which elements of the application or supplemental application are not contested and explaining the Secretary's position on those elements that are contested.

[Comment: The amendment to subsection (a) is issued concurrent with the Court's discontinuation of the practice of including in Clerk's orders regarding consent dispositions a caution regarding the filing deadline for an application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA).

The amendment specifies the time at which a judgment of the Court becomes final. In light of the additional language, the statutory citations are deleted as unnecessary; the last sentence is replaced by a reference to Rule 25. Subsection (b) is added to provide specifically for the submission, once an initial EAJA application is granted, of a supplemental EAJA application requesting fees and expenses for the fee litigation itself; another reference to Rule 25 is added. Subsection (c) is amended (in light of the premature submission in some cases of EAJA applications prior to judgment becoming final), so as to start the Secretary's 30-day response time from the Court's filing of the EAJA application, rather than upon service of an application on the Secretary, which occurs at the time when a premature application is submitted. In the case of premature applications, unless previously returned to the appellant or petitioner by the Court, filing occurs, upon the Court's initiative, after judgment becomes final. Subsection (c) is also amended to provide a 30-day period for the Secretary to file a response to a supplemental EAJA application as provided for in new subsection (b).]

Supreme Court, U.S.
FILED
DEC 24 2003
OFFICE OF THE CLERK

(6)

No. 02-1657

In the Supreme Court of the United States

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

AUSTIN C. SCHLICK
Assistant to the Solicitor General

WILLIAM KANTER
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TIM S. MCCLAIN
General Counsel

RENÉE L. SZYBALA
Assistant General Counsel

MICHAEL J. TIMINSKI
Deputy Assistant General Counsel

MICHELLE DOSES BERNSTEIN
MICHELLE RUSSELL KATINA
Attorneys
Department of Veterans Affairs
Washington, D.C. 20420

BEST AVAILABLE COPY

QUESTION PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412(d), provides in pertinent part that a party seeking an award of attorneys fees against the United States "shall, within thirty days of final judgment in the action, submit to the court an application * * * which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. 2412(d)(1)(B). The question presented in this case is:

Whether an award of fees under Section 2412(d) is barred if the applicant fails to file, within 30 days of final judgment, a fee application alleging that the government's position was not substantially justified.

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In the Supreme Court of the United States

No. 02-1657

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 319 F.3d 1346. The order of this Court (Pet. App. 36a) vacating an earlier judgment of the court of appeals and remanding is reported at 536 U.S. 920. The earlier opinion of the court of appeals (Pet. App. 26a-35a) is reported at 273 F.3d 1087. The order of the United States Court of Appeals for Veterans Claims (Pet. App. 22a-25a) is reported at 13 Vet. App. 530.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. A petition for rehearing was denied on April 17, 2003 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on May 9, 2003. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. 2412 are set out in an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

1. a. Before 1980, 28 U.S.C. 2412 authorized courts to award costs to prevailing parties in civil litigation against the United States, but further provided that the awardable costs did "not includ[e] the fees and expenses of attorneys." 28 U.S.C. 2412 (1976).

In 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325. Among other reforms, EAJA amended Section 2412 by authorizing awards of attorneys fees against the United States. Former Section 2412, authorizing awards of costs but not attorneys fees, was amended slightly and became new Section 2412(a). See 8 U.S.C. 2412(a) (Supp. IV 1980). In new Section 2412(b), Congress authorized, "[u]nless expressly prohibited by statute," awards to prevailing parties of "reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a)." 28 U.S.C. 2412(b). Congress provided that attorneys fees may be awarded under Section 2412(b) "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b). Section 2412(b) allows courts to award attorneys fees against the government under generally applcable equitable exceptions to the "American Rule" (*i.e.*, "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees," *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 257 (1975)), such as the exceptions allowing attorneys fees to be awarded against losing parties who disobey a court order or act in bad faith. In addition, attorneys fees may be awarded under Section 2412(b) pursuant to generally applicable statutory fee-shifting provisions that do not expressly authorize such awards specifically against the United States. See H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 8-9 (1980); S. Rep. No. 253, 96th Cong., 1st Sess. 3-4, 19 (1979).

Whereas Section 2412(b) makes the government liable for attorneys fees to the same extent as private parties, another provision of EAJA, codified as 28 U.S.C. 2412(d), authorized awards of attorneys fees and expenses against the government in particular circumstances where an award could *not* be made against a private party. Section 2412(d)(1)(A) authorized courts to award attorneys fees to prevailing parties in certain civil litigation against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1980). As a prerequisite to obtaining an award of fees under Section 2412(d) as added by EAJA, a prevailing party had to file, within 30 days of the court's final judgment in the underlying action, a fee application "which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party * * * . The party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. 2412(d)(1)(B) (Supp. IV 1980).

Rather than making Section 2412(d) permanent like Section 2412(b), Congress made its authorization of those extraordinary attorneys fees temporary, providing that Section 2412(d) would be repealed automatically for actions not yet commenced as of October 1, 1984. Pub. L. No. 96-481, Tit. II, § 204(c), 94 Stat. 2329.

b. In October 1984, Section 2412(d) expired for future actions, in accordance with EAJA. In August 1985, however, Congress repealed EAJA's sunset provision and reenacted Section 2412(d) with minor revisions that are not relevant to the instant case. Act of Aug. 5, 1985 (1985 EAJA Amendments), Pub. L. No. 99-80, §§ 2, 6(a) and (b)(2), 99 Stat. 184, 186. Sections 2412(d)(1)(A) and (B) currently provide:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
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> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. 2412(d)(1)(A) and (B).[1]

2. This case involves the application of the 30-day filing requirement of 28 U.S.C. 2412(d)(1)(B) to a request for attorneys fees in a case involving veterans' benefits.

a. A veteran who has a disability "resulting from personal injury suffered or disease contracted in line of duty" is entitled to disability benefits. 38 U.S.C. 1110, 1131. A veteran seeking such benefits must first present his claim to the Department of Veterans Affairs (formerly the Veterans Administration) (collectively, the VA). The veteran may appeal an adverse final decision of the VA to the Board of Veterans' Appeals (Board). 38 U.S.C. 511(a), 7104(a). If the Board denies the claim, its decision is reviewable by the Court of Appeals for Veterans Claims (CAVC). 38 U.S.C. 7252.

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[1] The 1985 EAJA Amendments made a "clarifying" change to Section 2412(d)(1)(A) to state that attorneys fees and expenses are available in proceedings for judicial review of agency actions, Pub. L. No. 99-80, § 2(a)(2), 99 Stat. 184. Section 2412(d)(1)(B) was amended to provide that whether or not the position of the United States was substantially justified must be determined on the basis of the record of the underlying civil action. § 2(b), 99 Stat. 184.

The United States Court of Appeals for the Federal Circuit has jurisdiction to review decisions of the CAVC for legal error, and its jurisdiction is exclusive. 38 U.S.C. 7292; see 38 U.S.C. 502.

b. Petitioner served in the United States Navy from 1972 until 1975. Pet. Br. 4; CAVC Rec. 164. In 1976, the regional office of the VA, noting that petitioner's claimed disability of chronic renal failure preexisted his service in the Navy, denied his claim for veterans' benefits based on that condition. Pet. App. 41a, 42a; CAVC Rec. 164. In July 1998, after additional benefits proceedings, the Board rejected petitioner's attempt to collaterally attack the VA's 1976 determination that his disability lacked a connection to military service. Pet. App. 22a, 41a-42a. On July 9, 1999, the CAVC vacated the Board's decision and remanded petitioner's case. *Id.* at 41a-44a; J.A. 1. The CAVC determined that, in light of "the law as it existed at the time of the [VA's] 1976 adjudication," the Board had failed to identify sufficient record evidence supporting the VA's conclusion that petitioner's renal failure was not connected to his naval service. Pet. App. 43a.

c. Thirteen days after the CAVC issued its opinion in petitioner's case, the CAVC received from petitioner's counsel an application for an award of attorneys fees and costs under EAJA. J.A. 2, 4-5. On July 23, 1999, the CAVC returned the application to petitioner's counsel, explaining that the application was premature because the CAVC's judgment would not become final until (1) the judgment was entered following the expiration of the time for filing post-decision motions, and (2) the 60-day time limit for taking an appeal to the Federal Circuit ran following entry of the judgment. J.A. 6-7.

On August 2, 1999, the CAVC entered its judgment in petitioner's benefits case. J.A. 2. On August 19, 1999, the court received a second application for an award of fees and costs under EAJA. J.A. 2, 8-9. In the application, petitioner's counsel sought attorneys fees of $19,334 and costs of $118. J.A. 9. Counsel stated that petitioner was "the prevailing party [in the CAVC's proceeding] as defined in 28 U.S.C. 2412"; that petitioner's net worth did not exceed the $2 million limit for eligibility to recover under Section 2412(d), see 28 U.S.C. 2412(d)(2)(B); that the counsel seeking fees and costs had represented petitioner since August 1998; and that counsel's fees were for matters before the CAVC and were itemized on an attached statement. J.A. 8-9.

The CAVC held counsel's second premature application until after the time for taking an appeal in the benefits case expired on October 1, 1999, and then, on October 4, 1999 (the following Monday), filed the fee application and directed the Secretary of Veterans Affairs to respond by November 3, 1999. J.A. 10. On November 3, the CAVC granted the government an extension of time, until December 3, 1999, for responding to the application. J.A. 2. On December 3, 1999, the government moved to dismiss the EAJA application. The government argued that the application was defective, and the court lacked jurisdiction to award fees under 28 U.S.C. 2412(d), because petitioner's counsel had failed to satisfy Section 2412(d)(1)(B)'s requirement of alleging, within 30 days of the final judgment, that the government's position in the underlying litigation lacked substantial justification. See Pet. App. 3a.

On December 9, 1999, petitioner filed a proposed amendment to his second fee application, in which he sought to add a new paragraph alleging that "[t]he gov-

ernment's position that [petitioner] had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." J.A. 11; see Pet. Resp. to Gov't Mot. to Dismiss and Mot. for Leave to Supplement Filing (filed Dec. 9, 1999).

d. The CAVC dismissed petitioner's EAJA application for lack of jurisdiction. Pet. App. 22a-25a. The court explained that "[i]n order to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. § 2412(d)(1)(B)," Pet. App. 23a, which in this case began to run on October 1, 1999. "[I]n order to satisfy jurisdictional requirements," the court continued, "the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the Secretary was not substantially justified." *Id.* at 23a-24a. Because petitioner's EAJA application contained no allegation that the government's position lacked substantial justification, and the proposed amendment seeking to add that allegation was filed more than a month after the expiration of the 30-day filing deadline on October 31, 1999 (a Sunday), the CAVC determined that the lack of a substantial justification had not been timely alleged and the court therefore "lack[ed] jurisdiction over [petitioner's] EAJA application." *Id.* at 25a.

3. The Federal Circuit affirmed. Pet. App. 26a-35a. It determined that "[t]he language of the EAJA statute is plain and unambiguous" in requiring that a party seeking fees under Section 2412(d) "'shall' submit an application including each of the four requirements enumerated, within the thirty-day time limit." *Id.* at 30a. The court acknowledged (*id.* at 30a-32a) that the

Third and Eleventh Circuits had held, in *Dunn* v. *United States*, 775 F.2d 99 (3d Cir. 1985), and *Singleton* v. *Apfel*, 231 F.3d 853 (11th Cir. 2000), that the filing of a timely request for fees satisfies the statutory timeliness requirement, and the application may be amended outside the 30-day period to satisfy the content requirements of Section 2412(d)(1)(B) if the government is not prejudiced and the applicant has complied with court orders. See 775 F.2d at 104; 231 F.3d at 858. The Federal Circuit, however, rejected the reasoning of those decisions, deeming them inconsistent with Section 2412(d)(1)(B)'s use of "the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements." Pet. App. 33a.

The court of appeals further stated that the language of Section 2412(d) "does not mandate strict compliance" with the four enumerated requirements for the content of a fee application, and therefore does not "foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected." Pet. App. 33a. The court accordingly concluded that it is only "[w]hen the application completely fails to address one of the four statutory requirements by the thirty-day deadline" that inadequate content renders the application jurisdictionally defective. *Ibid.*

Applying those principles, the Federal Circuit held that the CAVC lacked jurisdiction over petitioner's fee application because the application "was entirely devoid of the required allegation that the Government's position was 'not substantially justified,'" and petitioner "failed to remedy the jurisdictional defect before the expiration of the thirty-day deadline." Pet. App. 35a.

4. On petition for a writ of certiorari, this Court granted the petition, vacated the judgment of the court

of appeals, and "remanded to the * * * Federal Circuit in light of *Edelman* v. *Lynchburg College*, [535 U.S. 106 (2002)]." Pet. App. 36a. In *Edelman*, the Court upheld a regulation of the Equal Employment Opportunity Commission (EEOC) pursuant to which an administrative charge of employment discrimination that is timely filed with the EEOC under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e)(1), may be amended after the charge-filing deadline to include the oath or affirmation required by 42 U.S.C. 2000e-5(b), and that subsequent verification relates back to the date on which the charge was filed. See 535 U.S. at 110 n.2, 112-119.

5. On remand, the Federal Circuit once again affirmed the CAVC's dismissal of petitioner's fee application. Pet. App. 1a-18a. The court of appeals reiterated its view that the rule of the Third and Eleventh Circuits, which allows applicants to satisfy the content requirements of Section 2412(d)(1)(B) after the expiration of the 30-day deadline absent prejudice to the government or violation of a court order, is inconsistent with the plain language of EAJA. See Pet. App. 4a-11a.

The court of appeals then addressed the *Edelman* decision and concluded that this Court's approval of the EEOC's relation-back rule is not controlling here, for three reasons. First, the court of appeals explained, Title VII "is 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" Pet. App. 13a (quoting *Edelman*, 535 U.S. at 115, and *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1998)). By contrast, the court of appeals noted, EAJA "is directed to attorneys seeking attorney fees" and "paternalistic protection" against inadvertent forfeiture of rights "is not required." *Ibid.*

Second, the court of appeals observed that the two statutory requirements at issue in *Edelman*—timely filing of the discrimination charge and verification—"are contained in separate statutory provisions" that this Court determined are not interdependent. Pet. App. 13a (citing 42 U.S.C. 2000e-5(b) and (e)(1)). In EAJA, the court of appeals explained, the required allegation of no substantial justification "is part of the single statutory provision detailing both the contents required for an EAJA application and the requirement that the application be filed within thirty days." *Id.* at 14a. The required allegation, the court continued, "is not a pro forma requirement" like the verification requirement in *Edelman*, "but rather requires an applicant to analyze the case record." *Ibid.*

Third, the court of appeals noted that whereas the statutory verification requirement in *Edelman* was "a tool to weed out frivolous claims," Pet. App. 14a; see *Edelman*, 535 U.S. 116, the substantial justification allegation "provide[s] a threshold for fee determination," Pet. App. 16a; see *id.* at 14a (substantial justification requirement "operates as a * * * threshold for fee eligibility") (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160 (1990)). The court of appeals determined that the requirement of alleging that the government's position was not substantially justified is "more akin to" insufficient content in a notice of appeal, which this Court treats as a jurisdictional defect that cannot be waived or excused, see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), than to the oath or affirmation that was allowed to relate back in *Edelman*. Pet. App. 16a.

For those reasons, *Edelman* did not alter the Federal Circuit's conclusion that petitioner's "absolute noncompliance with [the] jurisdictional threshold" of alleging

that the government's position was not substantially justified "is fatal." Pet. App. 18a.

Chief Judge Mayer dissented Pet. App. 19a-21a. In his view, the requirement of alleging a lack of substantial justification is comparable to the verification requirement in *Edelman*, in that both "are aimed at stemming irresponsible litigation." *Id.* at 19a. He further expressed the view that a fee applicant's failure to include the required allegation within the 30-day filing period "does not prejudice the government's response to the application" and that applying the allegation requirement as a prerequisite to recovery of fees is inconsistent with EAJA's purpose of "eliminat[ing] the financial disincentive for those who would defend against unjustified governmental action." *Id.* at 20a.

On April 17, 2003, the court of appeals denied a petition for rehearing. Pet. App. 37a-38a.

SUMMARY OF ARGUMENT

I. As this Court has indicated and lower courts uniformly have concluded, the requirement of alleging a lack of substantial justification for the government's position, like the other mandatory content requirements that apply to fee applications under 28 U.S.C. 2412(d)(1)(B), is subject to the statute's 30-day filing deadline. The sentence containing the allegation requirement immediately follows, and refers back to, the sentence containing the 30-day deadline and the other content requirements for a fee application. Moreover, Congress would not have established a 30-day deadline for satisfying *some* of the mandatory content requirements, without setting a deadline for satisfying *all* of them.

II. Petitioner argues that fee applicants generally may satisfy the content requirements of Section

2412(d)(1)(B) after the 30-day deadline, if they submitted a fee application of some sort within the filing period. That approach ignores the principles of sovereign immunity that apply in this case. The 30-day deadline and the content requirements of Section 2412(d)(1)(B) are limitations on the government's waiver of its sovereign immunity. As conditions on the waiver, those express requirements must be strictly construed. If a fee applicant does not comply with the statutory content requirements within the time established by Congress, then the terms of the waiver of sovereign immunity have not been satisfied and the court may not award fees.

Provisions of the Federal Rules of Civil Procedure that broadly allow late amendments to civil complaints and certain other pleadings, see Fed. R. Civ. P. 15(c), and that establish flexible filing requirements for most attorneys-fee requests, see Fed. R. Civ. P. 54(d)(2), are inapplicable by their terms to fee applications under Section 2412(d). Likewise, *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002), does not support petitioner's proposed relation-back rule. *Edelman* involved the application of an agency regulation to private litigation, not a waiver of sovereign immunity. None of the reasons that the Court gave for upholding the agency's relation-back approach in *Edelman* applies to the filing requirements of Section 2412(d). To the contrary, the statutory language in this case is critically different than the language in *Edeiman*, and that difference compels a different result. Here, both the timing and content requirements appear in a single paragraph of the statute, rather than in two independent provisions, as in *Edelman*. The legislative history of Section 2412(d), and the policies underlying the provision, also show

that Congress did not intend to adopt a relation-back rule like the one urged by petitioner.

III. This Court should not address petitioner's argument that the 30-day deadline established for filing a complete fee application under Section 2412(d) is subject to equitable tolling. Petitioner emphasized below that his case involves only straightforward attorney error in failing to allege a lack of substantial justification for the government's position. Furthermore, petitioner did not preserve his equitable tolling argument in the court of appeals, and no court of appeals ever has addressed petitioner's assertion that equitable tolling of the 30-day deadline is appropriate under *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990).

If, however, this Court were to address petitioner's equitable tolling argument, it should reject petitioner's position. *Irwin* rests on a determination that, when Congress waives the United States' sovereign immunity from suit, it generally intends that the government will be treated like a private litigant in the application of equitable tolling principles. That general rule does not apply here. Section 2412(b) of Title 28 subjects the government to liability for attorneys fees in the same manner as private parties are liable. Section 2412(d) is directed precisely at situations in which Section 2412(b) and the generally applicable rules developed in the private-party context *do not* authorize fee-shifting. *Irwin*'s reasoning that Congress likely incorporated generally applicable equitable tolling principles cannot properly be extended to this context, in which Congress, in waiving sovereign immunity, specifically decided *not to rely* on the fee-recovery rules that have been developed in private-party litigation.

ARGUMENT

I. FEE APPLICANTS UNDER SECTION 2412(d) MUST ALLEGE WITHIN 30 DAYS OF FINAL JUDGMENT THAT THE POSITION OF THE UNITED STATES WAS NOT SUBSTANTIALLY JUSTIFIED

Petitioner's threshold position, developed only at the end of his brief (at 36-40), is that "the 30-day limit [of Section 2412(d)(1)(B)] *does not apply* to the requirement that an EAJA applicant allege that the government's position was not substantially justified." Pet. Br. 17 (emphasis added). In *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), this Court stated, to the contrary, that a fee application under Section 2412(d) must "be submitted to the court within 30 days of the final judgment in the action" and "must contain an allegation 'that the position of the United States was not substantially justified.'" *Id.* at 158, 160. The lower courts likewise have concluded that the mandatory allegation of a lack of substantial justification, like the other pleading requirements of Section 2412(d)(1)(B), is subject to the 30-day filing requirement. See, *e.g.*, Pet. App. 6a; *Fields* v. *United States*, 29 Fed. Cl. 376, 377 (1993); *Woods* v. *HHS*, 778 F. Supp. 976, 979 (N.D. Ill. 1991); *FDIC* v. *Addison Airport of Tex., Inc.*, 733 F. Supp. 1121, 1124 (N.D. Tex. 1990); see also *Dole* v. *Phoenix Roofing, Inc.*, 922 F.2d 1202, 1205 (5th Cir. 1991) (discussing similar language in 5 U.S.C. 504(a)(2)).

Those decisions are correct. The first sentence of Section 2412(d)(1)(B) states that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application * * * which shows": (1) prevailing-party status; (2) that the applicant is within the category of persons eligible to receive fees under 28 U.S.C.

2412(d)(2)(B)[2]; and (3) the itemized amount sought. 28 U.S.C. 2412(d)(1)(B). The second sentence of Section 2412(d)(1)(B) then provides: "The party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. 2412(d)(1)(B).

The second sentence, in stating that the applicant "shall *also*" make the allegation of no substantial justification, expressly connects the allegation requirement of the second sentence to the timing and content requirements of the first sentence. Moreover, one meaning of "also" is "in the same manner," which expressly extends the 30-day deadline to the allegation requirement. See, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 62 (1993) (def. 1); *The Random House Dictionary of the English Language (Unabridged)* 60 (2d ed. 1987) (def. 2); *Black's Law Dictionary* 77 (6th ed. 1990) ("in like manner").

It would have made little sense for Congress to exempt the allegation concerning a lack of substantial justification from the deadline that applies to the other content requirements for fee applications. Legislators wanted fee litigation under EAJA to be commenced and completed quickly. See, *e.g.*, H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 27 (1980) (Rep. LaFalce); *Equal Access To Justice Act of 1979, S. 265: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 43 (1979) (Sen. DeConcini). Congress, like this Court, did not want requests for attorneys fees

[2] Section 2412(d)(2)(B) specifies that eligibility for fees under Section 2412(d) is limited to individuals with a net worth of $2 million or less at the time the action was filed, small businesses, and certain tax-exempt organizations. 28 U.S.C. 2412(d)(2)(B).

to "result in a second major litigation." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988) (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). If the 30-day deadline did not apply to the no-substantial-justification allegation, then the deadline for submitting the other mandatory elements of the application would not provide any meaningful assurance that the fee application would be complete and ready for a response within 30 days of the final judgment. Furthermore, it would be illogical to set a deadline for submitting itemized statements justifying the *amount* of a fee request, if there were no deadline for making the no-substantial- justification allegation, which is necessary to establish the government's liability for fees in the first place.

Petitioner attaches significance to the fact that the mandatory allegation is required in a different sentence than the one stating the 30-day deadline. Pet. Br. 36-39. But there is an obvious stylistic and substantive reason why Congress would have chosen to state the requirements for a fee application in two sentences when, as petitioner asserts (*id.* at 39), it would have been grammatically possible to "merge[] both sentences into one." Congress's placement of the allegation requirement in a separate sentence highlights that it puts a different burden on the applicant than the requirements of the first sentence. Whereas the three elements mandated by the first sentence must be "show[n]" in the fee application, the absence of a substantial justification need only be "allege[d]," whereupon, if the applicant has made the showings required under the first sentence, the government has the burden of proving that its position in the underlying litigation was substantially justified, see 28 U.S.C. 2412(d)(1)(A).

II. THE 30-DAY DEADLINE FOR ALLEGING A LACK OF SUBSTANTIAL JUSTIFICATION IS NOT OVERRIDDEN BY A "RELATION-BACK" RULE

Petitioner further contends (Br. 24-29, 33-36) that, even if the 30-day deadline applies to the allegation requirement of Section 2412(d)(1)(B), the deadline nevertheless has little practical significance, because late allegations of a lack of substantial justification should "relate back" to the filing of the incomplete EAJA application. Petitioner thus urges (Br. 33) this Court to adopt the view of the Third Circuit in *Dunn* v. *United States*, 775 F.2d 99, 104 (1985), and the Eleventh Circuit in *Singleton* v. *Apfel*, 231 F.3d 853, 858 (2000), that a timely but defective fee application may be amended after the deadline to satisfy the statutory content requirements, absent prejudice to the government or noncompliance with court orders. The Federal Circuit correctly rejected that extreme version of the relation-back rule, which would excuse the complete omission of one or more of the four required elements of an EAJA fee petition.

A. The Requirements Of Section 2412(d)(1)(B) Are Conditions On A Waiver Of Sovereign Immunity And Must Be Strictly Construed

The requirement of filing a timely fee application that has the prescribed content is a condition on the federal government's waiver of sovereign immunity in Section 2412(d)(1)(A). See *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) ("The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity."). Accordingly, although this Court should not "narrow the waiver that Congress intended," *ibid.* (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118

(1979)), the requirements of Section 2412(d)(1)(B) "must be strictly construed," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990). See *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.") (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).

Strict construction also is appropriate because Section 2412(d) establishes a fee-recovery regime that departs from the common law rule that parties generally are responsible for their own attorneys fees. See *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 304-305 (1959) ("Any such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import.'") (quoting *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879)); *Lessee of Livingston* v. *Moore*, 32 U.S. (7 Pet.) 469, 495 (1833) ("Liens, being in derogation of common law, are to be construed strictly, and enforced literally.").

Consistent with those principles, the precise terms of the government's consent to be subject to fee awards under Section 2412(d) define a court's power to award fees. In particular, and as the courts of appeals consistently recognize, compliance with the 30-day filing requirement is a mandatory prerequisite to a fee award. See, *e.g.*, Pet. App. 6a (citing cases); *Dunn*, 775 F.2d at 103. To prevail on his relation-back argument, therefore, petitioner must demonstrate that, in requiring that a fee application containing the mandatory content "shall" be filed with the court "within thirty days of the final judgment," 28 U.S.C. 2412(d)(1)(B),

Congress itself incorporated an expansive relation-back exception that would excuse the complete omission of a required element specified in the statute. Petitioner cannot make that showing.[3]

B. Petitioner's Relation-Back Rule Is Not Supported By The Text Of Section 2412(d) Or The Federal Rules Of Civil Procedure

The Federal Circuit rejected the version of the relation-back rule adopted by the Third and Eleventh Circuits as contrary to "the plain language of the EAJA

[3] Petitioner argues at length (Br. 19-24) that the filing requirements of Section 2412(d)(1)(B) are not "jurisdictional," because Congress did not expressly refer to jurisdiction in Section 2412(d)(1)(B) and courts that receive EAJA applications have jurisdiction over the underlying dispute that gave rise to the fee application. Congress does not have to use the word "jurisdiction" to establish a mandatory precondition for judicial consideration of a particular matter such as a fee application—especially when the relevant legislative history *does* use that term. See *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314-317 (1988) (discussing mandatory requirements for filing a notice of appeal); see also pp. 28-30, *infra* (discussing legislative history of Section 2412(d)). Furthermore, Congress drafted the language of Section 2412(d)(1)(B) in parallel with the nearly identical language of 5 U.S.C. 504(a)(2), which applies to fee awards in agency proceedings that may present "jurisdictional" issues distinct from those in court proceedings. The courts of appeals uniformly interpret Section 2412(d)(1)(B) as establishing at least some "jurisdictional" requirements. See Pet. App. 6a (citing cases); *Dunn*, 775 F.2d at 103 (30-day requirement); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985) (discussing cases before 1985 EAJA Amendments). Regardless of that label, however, an attorneys fee application under EAJA is a claim for money from the United States and in the absence of a waiver of sovereign immunity courts lack authority to grant fee requests. The relevant question therefore is whether an award of fees to petitioner would be consistent with the waiver of sovereign immunity contained in Section 2412(d).

statute." Pet. App. 8a, 9a. Petitioner does not attempt to argue that the rule is suggested by the text of Section 2412(d). Absolutely nothing in Section 2412(d) states or even implies that the 30-day deadline for filing the requisite information applies only when the government would suffer prejudice if it were not enforced. Because the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied," *Nakshian*, 453 U.S. at 161 (quoting *Soriano*, 352 U.S. at 276), that should be the end of the Court's inquiry on this issue.

In an effort to overcome the text of EAJA, petitioner relies on Rule 15(c) of the Federal Rules of Civil Procedure, which provides that "[a]n amendment of a pleading relates back to the date of the original pleading" when certain requirements are satisfied. Fed. R. Civ. P. 15(c). As petitioner ultimately acknowledges (Br. 28), however, fee applications under EAJA are not "pleadings" subject to the relation-back regime of Rule 15(c). See Fed. R. Civ. P. 7(a). Furthermore, Rule 15 establishes "an amendment policy that is more liberal than that permitted at common law or under [earlier codes of procedure]," 6 Charles A. Wright et al., *Federal Practice and Procedure* 505 (2d ed. 1990), which makes it doubly inappropriate to extend Rule 15(c) to filings that are not covered by the Rule. See p. 19, *supra*. Finally, in light of the strict-construction rule that applies here because a waiver of sovereign immunity is involved, a federal rule of procedure, let alone petitioner's uncodified "Rule 15 principles" (Br. 28), cannot remotely justify inferring an exception to the 30-day rule of Section 2412(d)(1)(B).

Significantly, an EAJA application differs substantially from the pleadings to which Rule 15(c) applies, in

that the EAJA applicant possesses at the time of the final judgment every piece of information that is necessary to resolve the fee dispute. There is no policy imperative that EAJA applicants be given the same pleading flexibility that is afforded under the notice-pleading approach of the Federal Rules of Civil Procedure. To the contrary, this Court has warned against conceptualizing the EAJA fee application process as "a second major litigation." *Underwood*, 487 U.S. at 563 (quoting *Hensley*, 461 U.S. at 437); *Jean*, 496 U.S. at 163 (same). Petitioner's attempt to analogize amending a fee application to amending a civil complaint (Br. 26-27) therefore is misplaced.

Petitioner also relies (Br. 22-23) on Rule 54(d)(2) of the Federal Rules of Civil Procedure. Rule 54(d)(2) generally governs the filing of motions for attorneys fees in litigation. It states that "*[u]nless otherwise provided by statute or order of the court*, the motion must be filed no later than 14 days after entry of judgment" and must contain specified information such as "the judgment and the statute, rule, or other grounds entitling the moving party to the award." Fed. R. Civ. P. 54(d)(2)(B) (emphasis added). Rule 54(d)(2)(B) is inapplicable to the fee application in this case because, in contrast to 28 U.S.C. 2412(b), the authorization of extraordinary fee awards contained in Section 2412(d) does "otherwise provide[]" filing requirements for fee applications. Cases in which courts modify the default requirements of Rule 54(d)(2)(B), see Pet. Br. 23, likewise are unhelpful to petitioner, because the Rule expressly allows courts to do so.

The procedural rules on which petitioner relies do highlight what Section 2412(d) *does not say*. Cf. Pet. Br. 37 (citing "the principle of statutory construction that 'presume[s] that Congress acts intentionally and

purposely' when it 'includes particular language in one section of a statute but omits it in another'") (quoting *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 338 (1994); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)). Section 2412(d) neither authorizes judicial departures from its mandates, as Rule 54(d)(2)(B) does, nor establishes guidelines for allowing untimely amendments, as Rule 15(c) does. Nor does Section 2412(d) incorporate filing requirements established under the common law and other statutory fee authorizations, as Section 2412(b) does. Moreover, Rule 15(c) (which predated EAJA) and Section 2412(b) show that Congress had ample models for authorizing judicial "relax[ation]" (Pet. Br. 23) of fee-recovery rules if it had intended to do so. The natural inference—and the only conclusion consistent with the principle that waivers of sovereign immunity must be strictly construed—is that Section 2412(d) does *not* authorize courts to ignore noncompliance with its requirements.

C. *Edelman* v. *Lynchburg College* Does Not Support Petitioner's Relation-Back Argument

Petitioner next argues (Br. 28) that the relation-back rule applied by the Third and Eleventh Circuits "is fully consistent with" *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002). See Pet. Br. 29, 36-38 (discussing *Edelman*). The court of appeals correctly rejected that argument. See pp. 10-12, *supra*. Unlike this case, *Edelman* did not involve a waiver of sovereign immunity. In *Edelman*, moreover, this Court gave six reasons for upholding the Equal Employment Opportunity Commission's rule allowing verifications of discrimination charges to relate back to the date of the charge, none of which supports the application of a similar relation-back rule in the instant case.

Statutory Text and Structure. First, the Court observed in *Edelman* that Title VII's charge-verification requirement, 42 U.S.C. 2000e-5(b), and the deadline for filing a charge of employment discrimination, 42 U.S.C. 2000e-5(e)(1), are separate provisions serving different purposes and "[n]either provision incorporates the other." *Edelman*, 535 U.S. at 112; cf. *Zipes* v. *TWA*, 455 U.S. 385, 393-394 (1982) (construing provision granting courts jurisdiction over Title VII claims as not contingent on strict satisfaction of "entirely separate" administrative charge-filing requirements). By contrast, and as already discussed (see pp. 15-17, *supra*), the requirement of alleging that the position of the United States was not substantially justified immediately follows Congress's statement of the 30-day filing deadline within the same subsection. The sentence requiring the allegation refers back to the sentence containing the 30-day deadline. The requirement of making the mandatory allegation also is functionally related to the requirement of showing prevailing-party status that is stated in the preceding sentence, inasmuch as both requirements pertain to court findings that constitute "one-time threshold[s] for fee eligibility" under Section 2412(d). *Jean*, 496 U.S. at 160. Furthermore, the 30-day filing requirement and the requirement of alleging that the position of the United States was not substantially justified similarly serve Congress's efficiency objectives and help to prevent fee applications from growing into "a second major litigation." *Underwood*, 487 U.S. at 563 (quoting *Eckerhart*, 461 U.S. at 437). Accordingly, unlike the separately codified timing and verification requirements discussed in *Edelman*, the timing and allegation requirements in

Section 2412(d)(1)(B) must be "read[] * * * together." *Edelman*, 535 U.S. at 112; see Pet. App. 13a-15a.[4]

Intended Beneficiaries. Second, allowing the verification of a discrimination charge to relate back to the date of the charge was consistent with "the nature of Title VII as 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" 535 U.S. at 115 (quoting *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1998)); see *id.* at 122 (O'Connor, J., concurring in the judgment) ("Permitting relation back of an oath omitted from an original filing is reasonable because it helps ensure that lay complainants will not inadvertently forfeit their rights."). As the court of appeals explained in this case (Pet. App. 13a), exactly the opposite is true of fee applications under Section 2412(d). "The EAJA statute * * * is directed to attorneys seeking attorney fees," who require no special protection from the courts. *Ibid.* Indeed, the EAJA application in this case was submitted by petitioner's attorney on his own behalf, see J.A. 8-9, without any suggestion (until the attorney belatedly tried to cure the defect in his application, see J.A. 11-12) that petitioner has any interest in the fee litigation.

Burden on Opposing Party. Third, the Court in *Edelman* took comfort from an EEOC policy under which employers are not required to respond in any fashion to unverified discrimination charges. See 535 U.S. at 115 & n.9. That rule ensured that employers

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[4] Petitioner quotes (Br. 38 n.9) a passage from the government's brief in *Edelman* that discusses the lack of a textual connection between the relevant statutory provisions in that case. Because a strong textual connection exists in this case, the quoted passage has no application here.

would not have to bear the expense of contesting unverified charges. Under the relation-back rule of the Third and Eleventh Circuits, however, the government may deem it necessary to address the merits of the fee request in responding to a facially defective EAJA application, particularly given the substantial possibility that the court would allow a late amendment correcting the defect. The relation-back approach also engenders disputes about whether particular fee applications should be dismissed on account of the applicant's failure to include the mandatory content. The litigation surrounding those disputes can be "no small thing," *id.* at 115, as is apparent from the *four years* of proceedings on that issue in this case. Cf. *Dunn*, 775 F.2d at 104 ("Litigation over fee amounts has on some occasions been almost as protracted as the underlying lawsuit.").

Analogy to Signatures on Notices of Appeal. Fourth, *Edelman* likened the requirement of verifying a Title VII charge, through an oath or affirmation, to the requirement of signing a notice of appeal under Federal Rule of Civil Procedure 11(a). 535 U.S. at 115-116. Unlike the "content requirements" for notices of appeal, the Court explained, the requirement of signing a notice can be satisfied after the notice is filed. *Id.* at 116; see *Becker* v. *Montgomery*, 532 U.S. 757 (2001). That "reasonable" relation-back rule for signatures on notices of appeal led the Court to conclude that allowing relation back was likewise "a good rule" for the EEOC to adopt when applying the analogous verification requirement of Title VII. 535 U.S. at 116. In this case, by contrast, the flexible signature rule for notices of appeal under Rule 11(a) and *Becker* is inapposite because petitioner failed to satisfy a substantive "content requirement[]," 535 U.S. at 116, for the fee application.[5]

Background Judicial Practice. Fifth, this Court observed in *Edelman* that courts historically "have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing." 535 U.S. at 116. Stating that Congress should be "presumed to have known of this settled judicial treatment of oath requirements when it enacted and later amended Title VII," the Court deemed that historical practice indicative of congressional intent to allow relation-back of verifications. *Id.* at 117; see *id.* at 122 (O'Connor, J., concurring in the judgment) ("The regulation is also consistent * * * with the common-law practice of allowing later verifications to relate back."). In this case, petitioner cites Federal Rule of Civil Procedure 15(c) as a background rule of law that suggests relation back. See Pet. Br. 25-29. But it is undisputed that Rule 15(c) does not allow relation back on the facts of this case. See p. 21, *supra*. Accordingly, and particularly given that this case arises in the context of a waiver of sovereign immunity, Congress cannot be said to have incorporated a clearly established background

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[5] Petitioner contends (Br. 35) that the Rule 11(a) signature requirement and the Section 2412(d)(1)(B) allegation requirement are comparable because "both go to the form or content of the document." *Edelman*, however, explains that *Becker* distinguished between the "the timing and content requirements for [a] notice of appeal," which are *not* subject to the relation-back rule, and a "signature defect" in the notice of appeal, which is subject to the relation-back rule. 535 U.S. at 116. As the Federal Circuit observed in this case (Pet. App. 17), the allegation requirement of Section 2412(d)(1)(B) addresses the "substantive content" of fee applications.

rule that would allow relation-back of petitioner's untimely amendment to his fee application.[6]

Legislative History. Finally, the *Edelman* Court noted that "Congress amended Title VII several times without once casting doubt on the EEOC's construction" that verifications relate back to the filing of the charge. 535 U.S. at 117 (footnote omitted). In this case, Congress likewise acted against the backdrop of an established interpretation when it reenacted Section 2412(d)(1)(B) in the 1985 EAJA Amendments. Here the established interpretation, of which Congress specifically was informed, was that the 30-day deadline "is jurisdictional and cannot be waived by the government or even the court." *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Admin. Practice and Proc. of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 32 (1983) (*1983 Hearing*); *id.* at 14 (same); *id.* at 75 ("[I]t has been held that the 30-day requirement from the time of final judgment is jurisdictional and may not be extended."); *Equal Access to Justice Act: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 126 (1982) ("[T]he courts * * * have generally held that the 30-day rule on filing an application is jurisdictional and a court * * * cannot extend that period."); *id.* at 36 (discussing *Wallis* v. *United States*, No. 453-79C (Ct. Cl. Nov. 25, 1981)); *id.* at 161 (reproducing law review article citing

[6] *New York Central & Hudson River Railroad* v. *Kinney*, 260 U.S. 340 (1922), on which petitioner relies (Br. 28-29) as evidence of historical practice before Rule 15(c), addresses only the amendment of a civil complaint and, in any event, suggests that there was no unequivocally established rule in that context. See 260 U.S. at 346 ("Of course an argument can be made on the other side, but * * * we are of opinion that a liberal rule should be applied.").

Wallis); see also *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985) (discussing cases and holding that "the statutory time limitation, as an integral condition of the sovereign's consent to be sued, is a jurisdictional prerequisite to an award of attorney's fees under the EAJA").

The legislative history of the 1985 EAJA Amendments directly states the drafters' understanding that courts would not be able to excuse fee applicants from complying with the filing requirements of Section 2412(d)(1)(B). The Senate Report on the text that became the 1985 EAJA Amendments explains that the "thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984)[7]; accord H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 7 (1985) ("[F]ee petitions *must* be filed within thirty days of [final] judgment.") (emphasis added). Moreover, during the reauthorization process, Congress rejected an amendment suggested by the Chairman of the Administrative Conference of the United States, under which courts could have extended the 30-day deadline "for good cause shown." *1983 Hearing* 15.

Petitioner's relation-back rule would frustrate congressional intent in another respect as well. Legislators sought in drafting the 1985 EAJA Amendments to "avoid any measure that will itself breed additional

[7] Although Senate Report No. 586 addresses a version of the EAJA amendments that the 98th Congress passed and the President vetoed, the changes made by the 99th Congress to satisfy the President did not involve the 30-day filing period. See H.R. Rep. No. 120, *supra*, Pt. 1, at 6-8. This Court has looked to Senate Report No. 586 for guidance in interpreting the 1985 EAJA Amendments. See *Melkonyan* v. *Sullivan*, 501 U.S. 89, 96 (1991); *Jean*, 496 U.S. at 159 n.7.

litigation." H.R. Rep. No. 1005, *supra*, Pt. 1, at 28 (Rep. LaFalce). Yet such litigation would be the inevitable consequence of *sometimes* allowing applicants to cure defective applications after the 30-day deadline, rather than straightforwardly requiring compliance with the express filing requirements of Section 2412(d)(1)(B).

* * * * *

Thus, none of the six threads of reasoning in *Edelman* supports the application of a relation-back rule under Section 2412(d).

D. The Policy Arguments Advanced In Support Of An Expansive Relation-Back Approach Are Unpersuasive

Although the interpretation of a waiver of sovereign immunity should not provide an opportunity for judicial policy-making, the Third Circuit in *Dunn*, echoed by the Eleventh Circuit in *Singleton*, justified its adoption of an expansive relation-back rule by invoking policy concerns. See *Dunn*, 775 F.2d at 103-104; *Singleton*, 231 F.3d at 858. The Third Circuit reasoned primarily that allowing applicants to "flesh[] out * * * the details" of their fee claims after the 30-day filing window would not prejudice the government. 775 F.2d at 104. That is incorrect, insofar as the statutory content requirements are at issue. Section 2412(d)(1)(B)'s allegation requirement, for instance, forces the EAJA applicant "to analyze the case record" before seeking fees, Pet. App. 14a, and thereby protects the government from incurring the time and expense of establishing a substantial justification for its position when the applicant's own lawyer has not concluded that such a justification was absent. Similarly, the applicant's mandatory showing concerning the amount of attorneys fees incurred and sought from the court may influence the government's decision whether to contest the fee

application. See H.R. Rep. No. 1005, *supra*, Pt. 1, at 14 (observation of Congressional Budget Office that "[i]n some cases, the cost in both time and dollars of [showing] such a justification may result in a Justice Department decision not to contest the awarding of fees, even when substantial justification may exist").

If, however, the Third Circuit was concerned that a fee applicant should have "some latitude to supplement his application to flesh out * * * missing details," that is precisely what the Federal Circuit allows—without broadly excusing compliance with the statutory filing deadline. Pet. App. 9a. Contrary to the understanding of the Third and Eleventh Circuits, see 775 F.2d at 104; 231 F.3d at 858, rejecting the expansive relation-back approach does not mean that fee applications are frozen when filed. The Federal Circuit allows supplementation to expand upon or correct the information in an application (for instance, the attorney's itemized statement of fees and expenses), provided that the applicant has not "completely fail[ed] to address one of the four statutory requirements by the thirty-day deadline." Pet. App. 9a.

The Eleventh Circuit expressed an additional concern that enforcement of the 30-day deadline may deter private parties from vigorously asserting their rights against the United States. 231 F.3d at 858. Chief Judge Mayer made the same argument in his dissenting opinion in this case. Pet. App. 20a. It is virtually inconceivable, however, that judicial enforcement of the clear and easily satisfied statutory requirements for fee applications would affect the underlying litigation. See *id.* at 13a. On the one hand, sophisticated litigants and attorneys who are aware of EAJA during the underlying litigation surely would plan on complying with the statute's straightforward requirements when seeking a

possible fee award in the future. On the other hand, litigants and attorneys who are not aware of EAJA's fee-recovery provisions would be entirely uninfluenced by judicial enforcement of EAJA. Accordingly, excusing non-compliance with Congress's filing requirements would not further the policies underlying EAJA.

III. THE 30-DAY DEADLINE FOR ALLEGING A LACK OF SUBSTANTIAL JUSTIFICATION IS NOT SUBJECT TO EQUITABLE EXTENSION

In *Irwin* v. *Department of Veterans Affairs*, this Court announced that "[o]nce Congress has made [a waiver of sovereign immunity]" covering a particular claim, a "rebuttable presumption of equitable tolling" applies under that waiver "in the same way that it is applicable to private suits." 498 U.S. at 95-96. Petitioner contends that, if (1) the allegation requirement of Section 2412(d)(1)(B) is subject to the 30-day deadline and (2) his amendment does not relate to back the filing date of the defective fee application, then "[t]he *Irwin* presumption applies here" (Br. 20) and makes his amendment timely under equitable principles.

The correct application of *Irwin* to Section 2412(d)(1)(B) need not be considered in this case because, even if *Irwin* were relevant, petitioner would not be entitled to equitable relief. Furthermore, petitioner's equitable tolling argument was not properly presented to the Federal Circuit and no court of appeals, including the Federal Circuit in this case, has ever considered the issue. But if this Court nevertheless addresses petitioner's equitable tolling argument, it should conclude, in light of the language, structure, and history of Section 2412(d) as well as the Court's reasoning in *Irwin*, that equitable tolling does not apply

and the 30-day filing deadline is not subject to judicial extension.

A. Equitable Doctrines Do Not Excuse The Neglect Of Petitioner's Counsel In Failing To Comply With The 30-Day Deadline

A determination that the 30-day filing deadline in Section 2412(d)(1)(B) is subject to equitable extension would not benefit petitioner. As *Irwin* states, the doctrine of equitable tolling is "extended * * * only sparingly," and does not immunize litigants from the consequences of their "garden variety * * * excusable neglect." 498 U.S. at 96.

Baldwin County Welcome Center v. *Brown*, 466 U.S. 147 (1984) (per curiam), specifically held that a party's mere failure to satisfy an express statutory filing deadline—there, a 90-day deadline for filing a court complaint under Title VII, 42 U.S.C. 2000e-5(f)(1)—does not "call for the application of the doctrine of equitable tolling." 466 U.S. 151. The Court explained that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Ibid.*

The courts of appeals likewise reject the view that missed filing deadlines can be equitably extended when the party (or the party's attorney) is responsible for the lateness of a submission. See, *e.g.*, *Martinez* v. *United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (en banc) ("[T]here must be a compelling justification for delay, such as 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'") (quoting *Irwin*, 498 U.S. at 96), petition for cert. pending, No. 03-41; *Johnson* v. *Hendricks*, 314 F.3d 159, 162 (3d Cir. 2002) ("Equitable tolling is permitted if (1) the defendant has actively

misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has timely asserted his rights mistakenly in the wrong forum.") (citations and internal quotation marks omitted), cert. denied, 123 S. Ct. 1950 (2003); *id.* at 163 ("[C]ourts of appeals * * * have consistently rejected the argument that an attorney's mistake in determining the date a habeas petition is due constitutes extraordinary circumstances for purposes of equitable tolling.") (citing cases); *Jihad* v. *Hvass*, 267 F.3d 803, 805 (8th Cir. 2001) ("Equitable tolling is proper only when extraordinary circumstances beyond [the party's] control make it impossible to file a petition on time."); *Harris* v. *Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("[A]ny resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result."); see also *Baldayaque* v. *United States*, 338 F.3d 145, 152 (2d Cir. 2003) (distinguishing "extreme situations" that support equitable tolling from "normal errors made by attorneys").

Petitioner argued in the CAVC that his proposed amendment to the fee application should be allowed because "the omission of the allegation as to substantial justification was the error of counsel," involving "an oversight in drafting." Pet. Resp. to Gov't Mot. to Dismiss and Mot. for Leave to Supplement Filing 3 (filed Dec. 9, 1999). Petitioner's uncontroverted record representation that the defect in the fee application was due to a mere attorney error necessarily defeats his equitable tolling argument.

Nevertheless, petitioner contends (Br. 29-31) that his late amendment should have been allowed in light of

Irwin's reference to decisions in which a late filing was deemed timely "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96; see *id.* at 96 n.3 (citing cases). The cases to which that language refers involved factors specific to the interpretation of particular statutory and procedural rules, rather than general equitable tolling principles. See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974) (adopting tolling rule as "the rule most consistent with federal class action procedure"); *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 427-436 (1965) (dismissal for improper venue of state-court actions brought under the Federal Employers' Liability Act (FELA)); *Herb* v. *Pitcairn*, 325 U.S. 77 (1945) (interpreting FELA, without reference to equitable tolling). As *Irwin* itself makes clear, those cases did not approve the dispensation of equitable relief solely to protect parties from the consequences of their own "neglect." *Id.* at 96.

Petitioner next argues that his pleading defect "was induced by the government's misconduct." Br. 31-32; see *Irwin*, 498 U.S. at 96; but see 4 Charles A. Wright et al., *Federal Practice and Procedure* § 1056 (Supp. 2001) (distinguishing between equitable tolling and equitable estoppel and citing cases); *OPM* v. *Richmond*, 496 U.S. 414, 430 (1990) ("The whole history and practice with respect to claims against the United States reveals the impossibility of an estoppel claim for money in violation of a statute."). Petitioner suggests (Br. 31-32) that, due to his attorney's error in submitting the EAJA application to the CAVC before it permissibly could be filed under Section 2412(d)(1)(B) (*i.e.*, before the CAVC's final judgment), the government effectively became obligated under a local rule of the CAVC

to notify petitioner of the defect in his pleading before the 30-day period for filing an EAJA application expired. That theory does not come close to demonstrating the sort of "induce[ment] or tricke[ry] by [government] misconduct" that the Court discussed in *Irwin*, 498 U.S. at 96.

As a threshold matter, it is highly doubtful that the government's mere failure to inform an opposing party about a defect in that party's submission to a court *ever* could constitute misconduct that would justify equitable tolling. Furthermore, petitioner's contentions concerning the government's obligations in the CAVC are incorrect. When petitioner's counsel filed his second fee application in August 1999, the CAVC already had made clear in rejecting petitioner's first application that if petitioner submitted another fee reques efore the CAVC's judgment became final, it would be deemed "premature" and not accepted for filing. J.A. 6. Therefore, if the government had filed a motion to dismiss the fee application within 30 days of petitioner's submission to the CAVC, it might have relied solely on petitioner's failure to comply with the CAVC's instructions concerning timeliness—without addressing the content of the fee application itself.

Furthermore, on October 4, 1999 (the same day that the CAVC filed petitioner's fee application after holding it for nearly two months as a courtesy to petitioner), the CAVC issued a briefing order under which the government's response was due on November 3, 1999—two days after the last day for filing a complete EAJA application. See J.A. 2. Thus, from the outset, the government's response to the fee application was due *after* petitioner's time for making the required allegation of no substantial justification. The government timely filed its motion to dismiss the fee application after

requesting and receiving one extension of time from the court. See J.A. 2.[8]

B. Petitioner's Equitable Tolling Argument Was Not Pressed Or Passed On In The Courts Below And Has Not Been Addressed By Any Court Of Appeals

The equitable tolling issue discussed in the petition is not ripe for an additional reason. The question whether equitable tolling doctrines apply to the 30-day deadline under Section 2412(d)(1)(B) was not properly raised or decided below. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below.").

Petitioner faults the court of appeals (Br. 19) for failing to "cite, much less discuss" *Irwin*'s treatment of equitable tolling, but that was because petitioner did not preserve an argument based on *Irwin*. In opposing the government's motion to dismiss in the CAVC, petitioner never suggested that his attempt to amend the fee application was timely under equitable tolling principles. Instead, consistent with the relation-back

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[8] In 2001, the CAVC amended its rules to state expressly that the government need not respond to premature EAJA applications that are not accepted for filing. Pet. Br. App. 2a-4a. That subsequent amendment conformed the CAVC's rules to the court's actual practice as reflected in this case, which avoids wasteful briefing about the timeliness of premature fee applications that, if dismissed, could be refiled in the same form at the proper time. The CAVC's amendment of its rules underscores that the government "turn[ed] square corners" (Pet. Br. 32) in responding to petitioner's fee application. See H.R. Rep. No. 120, *supra*, Pt. 1, at 18 n.26 (premature EAJA application "should be treated as if it were filed during the thirty-day period following the final decision").

argument he makes in this Court, petitioner contended that his late amendment should be allowed because it assertedly would not have prejudiced the government. See Pet. Resp. to Gov't Mot. to Dismiss and Mot. for Leave to Supplement Filing 1-4. Petitioner mentioned *Irwin* and equitable tolling for the first time in his reply brief in the Federal Circuit, by which time it was too late to introduce a new argument. See *Novosteel SA* v. *United States*, 284 F.3d 1261, 1273-1274 (Fed. Cir. 2002).

A further consideration is that, to our knowledge, no court of appeals ever has addressed whether the "rebuttable presumption" discussed in *Irwin* applies to claims for fees under Section 2412(d). Particularly given that petitioner did not properly raise that issue in the Federal Circuit, and that petitioner could not satisfy the requirements for equitable extension of the 30-day deadline in any case, this Court should allow the courts of appeals to consider in the first instance the application of *Irwin* to Section 2412(d), guided by this Court's resolution of the other issues in this case.[9]

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[9] Petitioner suggests (Br. 30-31) that the Third, Sixth, and Eleventh Circuits have "in effect * * * adopted" equitable tolling principles under Section 2412(d). That is incorrect, as the cases on which petitioner relies did not involve equitable tolling. The Third Circuit's decision in *Dunn*, 775 F.2d at 104, with which the Eleventh Circuit agreed in *Singleton*, 231 F.3d at 858, adopted an expansive relation-back theory under which amendments to cure defects in the mandatory contents of the fee application are allowed after the end of the 30-day filing period, provided that the government is not prejudiced and court orders have not been violated. In *United States* v. *True*, 250 F.3d 410 (2001), the Sixth Circuit relied on *Dunn* and *Singleton*, but held only that "the pleading requirements of § 2412(d)(1)(B)," as opposed to the 30-day filing deadline for submitting a fee application, "are not jurisdictional." *Id.* at 421.

C. *Irwin*'s Rationales For Equitable Tolling Do Not Apply In This Case

If the Court does address the application of *Irwin* to Section 2412(d) despite the foregoing considerations, it should conclude that the "rebuttable presumption" of equitable tolling recognized in *Irwin*, 498 U.S. at 95, is inapplicable in light of the text, structure, and history of that fee provision.

The *Irwin* decision rests on this Court's determination that, when Congress waives its sovereign immunity from suit, it generally intends that the government will be treated like a private litigant in the application of equitable tolling principles. The Court stated that "[o]nce Congress has made such a waiver, * * * making the rule of equitable tolling applicable to suits against the Government, *in the same way that it is applicable to private suits*, amounts to little, if any, broadening of the congressional waiver." 498 U.S. at 95 (emphasis added). *Irwin*'s reasoning does not apply here because, rather than subjecting the government to the same litigation rules that apply to private parties, Section 2412(d) authorizes fee awards against the government under rules that have no analogue in private litigation.

EAJA provides in 28 U.S.C. 2412(b) for fee awards when there is analogous fee liability in private litigation. Section 2412(b) states that "[t]he United States shall be liable for [attorneys] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b). Congress sought through Section 2412(b) to place the government "on a completely equal footing" with private parties in its liability for fee awards. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9

(1980). Accordingly, consistent with *Irwin*, Section 2412(b) subjects the government to the same rules applicable to private parties in fee proceedings. See, *e.g.*, *Jackson* v. *United States Postal Serv.*, 799 F.2d 1018, 1023 (5th Cir. 1986).

Section 2412(d) is different. It authorizes fee awards against the government when there is *not* an analogous basis for recovery in private-party litigation. Section 2412(d) "not only waives the sovereign immunity of the United States, but also creates a new basis for an award of attorney's fees beyond other common-law or statutory exceptions to the American Rule." Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 223 (1994). Section 2412(d) takes effect precisely when there is no basis for recovery under Section 2412(b) and the rules for private litigation.

Irwin does not dictate the application of equitable tolling doctrines in this case by analogy to private litigation, because *there is no analogous private litigation.* Cf. *Feres* v. *United States*, 340 U.S. 135, 141-142 (1950) (government not amenable to suit, despite waiver of sovereign immunity under Federal Tort Claims Act, where negligence suits by soldiers against military defendants have no close parallel in general tort law); *Rosenfeld* v. *United States*, 859 F.2d 717, 724 (9th Cir. 1988) ("The inquiry into the availability of interim [attorneys] fees under [the Freedom of Information Act], therefore, is informed by the fact that interim fees are available under analogous fee-shifting provisions in other statutes."). To the contrary, ordinary principles of statutory construction, reinforced by interpretive rules limiting deviation from both the American Rule and the terms of a waiver of sovereign immunity, suggest that the 30-day deadline of Section 2412(d) should be enforced without resort to the principles of equitable tolling.

Additional factors reinforce the inapplicability of the *Irwin* presumption. Congress drafted Section 2412(d) at a time, before *Irwin*, when the background presumption was that statutes of limitations in suits against the government were not subject to equitable tolling. See *Irwin*, 498 U.S. at 99 n.2 (White, J., concurring in part and in the judgment). Moreover, disputes concerning whether equitable tolling doctrines excuse a late filing on particular facts easily could expand into full-scale litigation in their own right, requiring the parties to develop, and the courts to consider, facts that are not contained in the record of the underlying litigation for which fees are requested. The 1985 EAJA Amendments added new language to Section 2412(d) that was aimed at avoiding collateral fact-gathering in fee proceedings. See 28 U.S.C. 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record * * * which is made in the civil action for which fees and other expenses are sought."); H.R. Rep. No. 120, *supra*, Pt. 1, at 6-7 (discussing new provision). Consistent with that congressional objective, the bright-line 30-day rule that the Federal Circuit applies makes timeliness disputes resolvable on the face of the fee application, thus helping to ensure that fee issues can be decided promptly and efficiently. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609, 610 (2001) (judicial interpretation of fee provisions should promote "ready administrability" and avoid "spawn[ing] a second litigation of significant dimension").

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
WILLIAM KANTER
AUGUST E. FLENTJE
Attorneys

TIM S. MCCLAIN
General Counsel
RENÉE L. SZYBALA
Assistant General Counsel
MICHAEL J. TIMINSKI
Deputy Assistant General Counsel
MICHELLE DOSES BERNSTEIN
MICHELLE RUSSELL KATINA
Attorneys
Department of Veterans Affairs

DECEMBER 2003

APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 2412 of Title 28 of the United States Code provides:

Costs and Fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction

of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful

violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of

1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with

any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

Supreme Court, U.S.
FILED
JAN 2 8 2004
OFFICE OF THE CLERK

No. 02-1657

IN THE
Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

PETER J. SARDA
WALLACE, CREECH & SARDA, L.L.P.
P.O. Box 12065
Raleigh, NC 27605
(919) 782-9322

BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
ALAN B. MORRISON
VALERIE M. NANNERY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

January 2004

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INTRODUCTION

An EAJA application is supposed to be filed within 30 days of final judgment. That application should contain three elements, which the government admits were timely provided in Mr. Scarborough's application. The applicant is also required to allege the following 10 words: "The position of the United States was not substantially justified." Although Mr. Scarborough did not utter those words within the 30-day period — which he maintains is not required — he supplied them immediately after the government brought the alleged omission to his attention. The government has never claimed any conceivable prejudice from this omission, nor does it contend that anything more than a pro forma recitation of the 10 words was required. Unlike the other elements of the application, on which Mr. Scarborough bore the burden of proof, Mr. Scarborough was not obliged to make any showing regarding substantial justification, which is an affirmative defense on which the government has the burden.

Despite all this, the government's position is that Congress barred the courts from considering Mr. Scarborough's fee application because the omission of the 10 words is a "jurisdictional" defect. The government persists in this argument, even though the fee litigation would have proceeded exactly the same way if Mr. Scarborough's amendment had been accepted, as it would had the 10 words been included in the initial application. The logic of the government's position is that, if the omission had gone unnoticed, and the fee issue had come to this Court on its merits, the Court would have been required to dismiss it because the Court of Appeals for Veterans Claims lacked "jurisdiction" over the fee application. As demonstrated in our opening brief, and as further shown below, the government's position cannot be sustained.

I. EAJA'S 30-DAY TIME LIMIT IS NOT JURISDICTIONAL, BUT RATHER IS SUBJECT TO THE COMMON-LAW DOCTRINES OF RELATION BACK AND TOLLING.

A. EAJA's 30-Day Period Is Not Jurisdictional.

1. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), presented the question left open in *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985) — "whether principles of equitable tolling, waiver, and estoppel apply against the Government when [the case] involves a statutory filing deadline." 498 U.S. at 94. The Court gave a simple, affirmative response: When Congress has waived the government's immunity, common-law exceptions to statutes of limitations apply "in the same way" as they do in "private suits." *Id.* at 95. Thus, unless Congress explicitly "provide[s] otherwise," the "general rule" is that statutory time limits running in favor of the government are not "jurisdictional." *Id.* at 95-96.

The government tries to limit *Irwin* drastically by implying that it applies only to claims of equitable tolling. Gov't Br. 32, 39. However, *Irwin* applied by its terms to waiver, tolling, and estoppel. Moreover, any such argument was put to rest by *Franconia Associates v. United States*, 536 U.S. 129 (2002), where the Court applied the *Irwin* presumption to the accrual of a limitations period running in favor of the government and reaffirmed its "recognition that *limitations principles* should generally apply to the Government 'in the same way that' they apply to private parties." *Id.* at 145 (emphasis added) (quoting *Irwin*, 498 U.S. at 95).

The government's brief never once mentions this "general rule" and instead operates under pre-*Irwin* precedents,

which assume that the government is entitled to special treatment when it invokes a limitations defense. *See* Gov't Br. 19 (citing pre-Irwin cases, including *Soriano v. United States*, 352 U.S. 270 (1957), whose reasoning was specifically repudiated in *Irwin*, 498 U.S. at 94-95). That assumption is fundamentally at odds with *Irwin*. Nor does the government point to anything in EAJA's text by which Congress overrode the presumption that limitation periods that run in favor of the government are not jurisdictional.

2. Far from overriding the *Irwin* presumption, EAJA's text provides additional support for the position that the 30-day period is not jurisdictional, because it reflects the fact that an EAJA application is filed in a court that *already* has jurisdiction over the underlying action. *See* Opening Br. 21. Before a time limit for a court filing can be considered "jurisdictional," the filing must, at the least, confer adjudicative power on the court in the first instance, and an EAJA application plainly does not do that. *See id.* at 21-22. The government's only response caricatures our position: that Congress must literally use the word "jurisdiction" "to establish a mandatory precondition for judicial consideration of a particular matter." Gov't Br. 20 n.3. That is not what we said. What we actually said is *exactly* what the government told this Court in *Kontrick v. Ryan*: "[U]nless strict compliance with a filing deadline is a prerequisite to the jurisdiction of the court, '[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling.'" Br. for the United States, at 10, in *Kontrick v. Ryan*, No. 02-819 (U.S. July 17, 2003) (citation omitted). The Solicitor General wholly ignores the contrary position he just took in *Kontrick*, leaving the conclusion that when the government seeks to protect its financial interest as "a creditor in many bankruptcies," *id.* at 1, it will rely on the general rule that statutes of limitations are not "jurisdictional," but when it

invokes a limitations period, it will disregard that rule.[1]

3. Unable to find statutory language that supports its position, the government resorts to so-called "legislative history" — what it artfully describes as the "Senate Report on the text that became the 1985 EAJA," which said that EAJA's filing period "is jurisdictional and cannot be waived." Gov't Br. 29 (quoting S. Rep. No. 98-586, at 16 (1984)). Even if this report were genuine legislative history, it would not assist the government because a single snippet in a committee report cannot overcome the principle of statutory construction set forth in *Irwin*, which may only be rebutted if "Congress ... provide[s] otherwise." *Irwin*, 498 U.S. at 96.

In any event, the government's "legislative history" warrants no consideration. In fact,"[n]o Senate Report was submitted with th[e EAJA] legislation" enacted by the *99th Congress* in 1985. 1985 U.S.C.C.A.N. 132. As the government grudgingly concedes, Gov't Br. 29 n.7, the Senate Report upon which the government relies was prepared for a 1984 version of EAJA passed by the *98th Congress* and *vetoed* by the President. *See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134; *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J.,

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[1]The Court recently issued its decision in *Kontrick*. The Court agreed with the government that the time limit established by Bankruptcy Rule 4004(a) is not "jurisdictional" because an objection to discharge filed under that Rule, like an EAJA application, does not invoke the court's subject-matter jurisdiction, *i.e.*, it does not serve to "delineat[e]" a "class[] of cases" "within a court's adjudicatory authority." *Kontrick v. Ryan*, ___ U.S. ___, 2004 WL 57261, *7 (Jan. 14, 2004). *Kontrick* held that the enforcement of Rule 4004(a)'s time limit had been forfeited by failure to timely raise a tardiness objection, and it did not reach the question whether equitable tolling might also have excused the late filing. *Id.* at *8.

concurring). The inherent unreliability of that report is demonstrated by the more in-depth House Report that accompanied the bill that actually became law. That House Report contains the same general discussion of EAJA's limitations period and cites the same authority as did the 1984 Senate Report, *but it omits the language upon which the government relies.* H.R. Rep. No. 99-120, pt. 1, at 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148. Indeed, it would have been anomalous for the 99th Congress to have made the limitations period strictly jurisdictional because, at the same time, it urged that the period not be construed in an "overly technical" manner as a "trap for the unwary." *Id.* at 18 n.26; H.R. Rep. No. 99-120, pt. 2, at 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156.[2]

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[2]The government's other "legislative history" is feeble at best. The government says that, when considering reauthorization of EAJA in 1983, Congress was "specifically informed" that the "established backdrop" was that the 30-day period is "jurisdictional." Gov't Br. 28. However, the government's citation is to a prepared statement of an Assistant Attorney General, who, in urging a statutory definition of "final judgment" that Congress did not enact, mentioned in passing that the period is "jurisdictional," without citing any authority. *Reauthorization of EAJA: Hearing Before the Subcomm. on Admin. Practice and Proc. of the Senate Comm. on the Judiciary* ("1983 Hearing"), 98th Cong., 1st Sess. 32 (1983). The government's other citations are even weaker: a private lawyer's EAJA practice manual, which cites a lone, pre-*Irwin* Court of Claims' decision, *id.* at 75; a brief synopsis of that decision in a 1982 digest of EAJA cases prepared by DOJ's Office of Legal Policy, *EAJA: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 36 (1982), and a law review article citing that same decision. *Id.* at 161. Finally, the government makes the absurd statement that "Congress rejected an amendment" that would have permitted extensions of the 30-day period. Gov't Br. 29. Congress never "rejected" anything. The government's citation is not to a floor vote, an introduced bill, or even a committee mark-up, but to a brief suggestion from the Chair

(continued...)

4. The government suggests that the *Irwin* presumption may be disregarded here because that presumption applies only where a statute creates a right of action against the government that is precisely analogous to a right of action against a private party. Gov't Br. 39-41. This argument fails for two reasons.

First, *Irwin* does not demand a private analogue. *Irwin* holds, quite simply, that there is a "*general rule*" under which limitations doctrines applicable in private litigation also apply in litigation involving the government, unless Congress provides otherwise. *See also Franconia Associates*, 536 U.S. at 145. Litigation against the government exists because Congress has enacted legislation creating rights against the government. Those rights are often peculiar to the relationship between the government and the citizenry, concerning matters such as the administration of government benefit programs or how the government contracts with private parties. Thus, many statutes creating causes of action against the government will apply only to government defendants and will not themselves contain a right of action applicable to private litigants. In other words, the government's demand for a private analogue would render *Irwin* largely a nullity.

The D.C. Circuit recently made this very point in a case involving whether equitable tolling applies under the Privacy Act, 5 U.S.C. § 552a, which creates rights only against federal agencies:

> We think th[e government's position] too narrow a reading of *Irwin*. Because much litigation against the

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[2](...continued)
of the Administrative Conference that he believed "worthy of the [Senate Judiciary] Committee's consideration." 1983 Hearing at 14-15.

> Government arises under statutes that do not apply to private parties, a rule that excluded such litigation would hardly be a "general rule to govern ... suits against the Government." Although the Court pointed out that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" we do not believe it thereby intended to make the presumption it was announcing contingent upon the presence of a parallel cause of action against a private party in the statute at issue. Rather, we believe the Court meant simply that it is reasonable to presume the Congress, unless it said otherwise, expected the Government to face equitable tolling in litigation because equitable tolling is a traditional feature of the procedural landscape.

Chung v. U.S. Dep't of Justice, 333 F.3d 273, 276 (D.C. Cir. 2003) (citations omitted).

Second, even if some sort of private analogue were required by *Irwin*, it surely exists in this case. Subsection (d) of EAJA is a fee-shifting statute that abrogates the "American Rule" and allows, under specified circumstances, prevailing parties to recover their attorney's fees against the United States. It is analogous to dozens of other "prevailing party" fee-shifting statutes that do, in fact, apply to suits between private litigants. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII); 15 U.S.C. 1692k(a)(3) (Fair Debt Collection Practices Act); 29 U.S.C. § 2617(a)(3) (Family and Medical Leave Act). The government's brief proves our point. It maintains that EAJA subsection (b), 28 U.S.C. § 2412(b) — which authorizes fees against the United States under common-law exceptions to the "American Rule" — is analogous to private-party litigation, *not because EAJA subsection (b) itself provides fees to private*

parties but because some other source of law already does so. *See* Gov't Br. 39. That is precisely the situation here. EAJA subsection (d) is directly analogous to *other* fee-shifting statutes that govern private litigation.[3]

For all of these reasons, the *Irwin* presumption applies here. Thus, the remaining question, to which we now turn, is whether Mr. Scarborough's fee application should have been considered timely under two doctrines ordinarily applicable to statutes of limitations — relation back and tolling.

B. 1. Relation Back. Like the accrual rule at issue in *Franconia Associates,* or the tolling, estoppel, and waiver concepts referenced in *Irwin*, relation back is a traditional common-law doctrine meant to mitigate the unfairness of unyielding applications of statutes of limitations. Relation back is also the doctrine that best fits the situation here. Unlike a tolling, estoppel, or waiver case, where the party seeking forbearance has filed late, Mr. Scarborough filed on time. As with any legitimate relation-back request, Mr. Scarborough sought only to amend his timely filing on a matter on which the government already had notice.

The government does not deny that Mr. Scarborough's amendment qualifies for relation back, as that amendment arose out of the same transaction or occurrence that is the subject of the fee application itself. It argues only that relation back under

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[3] *Franconia Associates*, 536 U.S. 129, confirms that, if a private analogue is required, the analogy between EAJA and other fee-shifting statutes is sufficient. That case involved a contract suit under the Tucker Act, which establishes no private analogue, though there are roughly similar private contractual rights of action. *Franconia Associates* did not hesitate to apply the *Irwin* presumption, *id.* at 145, without suggesting that a private analogue was required, or, if it was, that one was lacking.

EAJA "is not supported by the text of section 2412(d) or the Federal Rules of Civil Procedure." Gov't Br. 20. That argument misses the mark. Given the *Irwin* presumption, we need not show that EAJA's text explicitly refers to relation back. Rather, relation back applies here because it is consistent with the "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas,* 507 U.S. 529, 534 (1993).

For the same reason, Mr. Scarborough need not point to direct textual support in the Federal Rules of Civil Procedure for the proposition that relation back is allowed under EAJA. It is enough that Rule 15(c) carries forward a long-standing common-law tradition, *see* Opening Br. 28-29, and that relation back was "well recognized" before its codification in the Federal Rules. 1937 Adv. Comm. Note to Rule 15(c). In this regard, the government criticizes our citation to *New York Central & Hudson River Railroad Co. v. Kinney*, 260 U.S. 340 (1922), implying that its emphatic embrace of the relation-back doctrine was aberrational and stating that, prior to the Federal Rules, "there was no unequivocally established rule." Gov't Br. 28 n.6. That is not so. *Kinney* is one of any number of pre-Federal Rules cases showing that relation back was a well-entrenched general rule. *See, e.g., Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352, 353-54 (1915); *Missouri, Kansas, & Texas Ry. Co. v. Wulf,* 226 U.S. 570 (1913). More important, the government does not cite a single case — whether involving amendments to complaints, to other pleadings, or to administrative filings — that either questions the legitimacy of the relation-back doctrine or remotely suggests that Mr. Scarborough's amendment should have been rejected under it.

Finally, the government fundamentally misapprehends

our reliance on *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). The government goes to great length (at 26-34) to explain why, in its view, the considerations regarding EEOC discrimination charges under which relation back was permitted in *Edelman* are not pertinent here. But that detour into EEOC practice misses our point (and presumably this Court's point in remanding this case for reconsideration in light of *Edelman*, *see* 536 U.S. 920 (2002)). Our reliance on *Edelman* is simple. *See* Opening Br. 29. *Edelman* explained that both state and federal courts consistently employ the relation-back doctrine. 535 U.S. at 116. Principally for that reason, the Court held that relation back also applies to amendments to EEOC discrimination charges, and it strongly suggested that the doctrine would apply to administrative law generally. *See id.* ("if relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency."). At bottom, then, the government's position is that relation back is a good rule for complaints and other pleadings, *see* Fed. R. Civ. P. 15(c); for administrative agencies, *Edelman*, 535 U.S. 106; and for most court filings that are not pleadings, *see id.* at 116 (discussing *Becker v. Montgomery*, 532 U.S. 757 (2001)); but it is not a good rule for fee applications, at least where fees are sought from the government. That position is at odds with EAJA, decisions of this Court, and common sense.[4]

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[4]In any event, the government's bases for distinguishing *Edelman* are either irrelevant or favor Mr. Scarborough. For instance, the government claims that, although an employer need not respond to an unverified EEOC charge, the government faces a significant burden in responding to an incomplete EAJA application. Gov't Br. 26. As explained in our opening brief (at 36 & n.8, 39-40), omission of the no-substantial-justification allegation cannot possibly harm the government since it has the burden of showing substantial justification if it wishes to avoid fees. Moreover, fees may be denied in the highly unlikely event that the (continued...)

2. Equitable Tolling. The government argues that Mr. Scarborough waived his equitable tolling argument. It also maintains that the equitable tolling doctrine does not excuse Mr. Scarborough's omission of the no-substantial-justification allegation. Neither contention is correct.

a. The government's waiver argument borders on the frivolous. The government asserts that Mr. Scarborough did not raise the tolling argument or cite *Irwin* until his reply brief in the Federal Circuit. However, Mr. Scarborough raised equitable tolling, as well as the equitable principles enunciated in *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), and *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000), in *both* his opening and reply briefs in the Federal Circuit. Brief for Appellant, at 3-4 (arguing that, in light of government's misconduct, "the government should be estopped to assert the defense of a defective pleading."), 5-10 (same), in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000); Reply Brief for Appellant, at 3-5, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 24, 2001). Indeed, in the Federal Circuit itself, the government responded to Mr. Scarborough, asserting that, regardless of the facts, his application was barred because the 30-day period imposed an absolute jurisdictional bar. Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No.

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[4](...continued)
government is actually prejudiced by a pleading omission. *See, e.g., Singleton v. Apfel*, 231 F.3d 853, 858 (11th Cir. 2000). The government also claims that although "background judicial practice" favored relation back in *Edelman*, it disfavors relation back under EAJA. Gov't Br. 27. That argument cuts the other way. As explained in the text, *Edelman* transported "background judicial practice" to the administrative law context. Mr. Scarborough seeks only to apply "background judicial practice" in a *judicial* context.

00-7172 (Fed. Cir. Jan. 9, 2001).[5]

Equally important, at three stages before the Federal Circuit and this Court — in his first petition for rehearing en banc, in his first petition for certiorari, and in briefing on remand from this Court — Mr. Scarborough continued to press his equitable tolling argument, and all three times the government argued the merits of equitable tolling without mentioning waiver. *See* S. Ct. Rule 15.2 (respondent's brief in opposition should bring to this Court's attention any purported defect in issue raised in petition). Not until its response to Mr. Scarborough's second request for rehearing en banc after this Court's remand did the government breathe a word about waiver. And there it briefly suggested only that Mr. Scarborough should be defaulted for failing to use the magic word "tolling," while acknowledging that he raised the substance of the argument. *See* Corrected Appellee's Resp. to Pet. for Rehearing En Banc, at 14 & n.8, in *Scarborough v. Principi*, No. 00-7172 (Fed. Cir. Apr. 3, 2003). Thus, if anyone has waived an argument, it is the government, by arguing the merits of the tolling issue over the course of many briefs without even suggesting that Mr. Scarborough had forfeited it. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 125 n.26 (1981) (declining to consider habeas corpus petitioner's claim that

[5]The fact that Mr. Scarborough initially called his argument "estoppel" rather than "tolling" is not a basis for finding waiver, particularly given the close relation between the two doctrines. *See Nelson v. Adams*, 529 U.S. 460, 469 (2000) (rule that issues must be raised below to be preserved "does not demand the incantation of particular words; rather it requires that the ... court be fairly put on notice of the substance of the issue."). Indeed, what this Court in *Irwin* characterized as a basis for tolling, the D.C. Circuit has characterized as a basis for estoppel. *See Chung*, 333 F.3d at 278-79. *See also Elder v. Holloway*, 510 U.S. 510 (1994) (no need to cite a particular case to preserve argument).

government waived an argument because petitioner's waiver argument had itself been waived); *see also Kontrick*, 2004 WL 57261, *8-*9.[6]

b. On the merits, the government's entire argument is premised on the erroneous notion that tolling is never available where a lawyer has made an avoidable mistake. Gov't Br. 32-34. To get to that point, the government must overlook that there are two entirely distinct tolling categories — (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" and (2) where the claimant has been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. To be sure, the second tolling category demands more than a claimant's lawyer's "garden variety claim of excusable neglect" (which makes sense, since the focus in the second category is on the *adversary's* misconduct). *Id.* But it is clear that this requirement does not apply to the first tolling category, since, by definition, in those cases, the lawyer has made an avoidable mistake — filing a defective pleading. Indeed, the category-one cases cited with approval in *Irwin* involved avoidable mistakes: The lawyers filed timely, but defective, pleadings in the wrong court, *id.* at 96 n.3, and they did not claim any misconduct by an adversary.[7]

[6]As in its opposition to certiorari (at 13), the government also claims that the tolling issue is "not ripe" because it was not "decided below." Gov't Br. 37. That argument makes no sense. The Federal Circuit did not *explicitly* address tolling for an obvious reason: It held that EAJA's pleading requirements are "jurisdictional" and not subject to *any* exceptions. Cert. App. 5a-10a.

[7]Indeed, all five cases cited by the government for the proposition that tolling never applies when the claimant "is responsible for the lateness

(continued...)

Aside from its efforts to entirely evade category-one tolling, the government does not question that Mr. Scarborough meets the test for tolling. He filed a (purportedly) "defective pleading" well within the "statutory period," and no one disputes that he "actively pursued" his EAJA remedies. As noted, *Irwin* cited cases in which tolling was allowed even though the litigant timely filed a complaint *in the wrong court*, which might lead to confusion or prejudice. If anything, the litigants in those cases were less deserving of forbearance than Mr. Scarborough. He "actively pursued his judicial remedies" *in the correct court*, by filing a timely fee application that was defective, if at all, only because it was missing a one-sentence legal conclusion, whose omission prejudiced no one.

Mr. Scarborough also contends that he meets *Irwin*'s second tolling category — that his purported error was induced by the government's misconduct. In this regard, *the government does not deny that it deliberately avoided responding to Mr. Scarborough's fee application to induce what it later claimed was an irreparable jurisdictional defect.* Thus, we respond only to three points.

First, the government claims that "[p]etitioner's

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[7](...continued)
of a submission," Gov't Br. 33, are *category-two* cases where the claimant simply filed late, *see, e.g., Johnson v. Hendricks*, 314 F.3d 159 (3d Cir. 2002), not *category-one* cases, such as Mr. Scarborough's, where the claimant filed a timely, but purportedly defective, pleading. *See Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999). Ironically, four of these five cases hold or reaffirm that the habeas corpus filing period under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d), is *not* jurisdictional, but rather is subject to equitable tolling. *See, e.g., Baldayaque v. United States*, 338 F.3d 145, 150 (2d Cir. 2003); *Johnson*, 314 F.3d at 162.

uncontroverted ... representation" that his omission "was due to a mere attorney error necessarily defeats his equitable tolling argument." Gov't Br. 34. That statement is misleading. Although Mr. Scarborough omitted the no-substantial-justification allegation in his *initial* filing, his argument is that the government's violation of CAVC Rule 39(c) induced the untimeliness of his *amendment*.

Second, the government claims it had no duty to respond to the fee application, at a point when Mr. Scarborough could timely amend, because the application was filed "prematurely." Gov't Br. 36. That argument is wrong on its own terms. At the relevant time, Rule 39(c) required the government to respond to *all* EAJA applications — "premature" or not — within 30 days of service on the government, *see* Opening Br. at App. 1a, and, in later amending Rule 39(c), the CAVC acknowledged just that. *Id.* at App. 4a. More fundamentally, the government's premise is wrong. As explained in our opening brief (at 8 n.2), Mr. Scarborough's fee application was not premature and should have been filed by the CAVC Clerk when it was submitted.

Finally, the government says an October 4, 1999, CAVC order permitted the government to respond to Mr. Scarborough's August 19, 1999 fee application "after the last day for filing a complete EAJA application." *See* Gov't Br. 36. That order is irrelevant. The salient fact is that, under CAVC Rule 39(c), the government was required to respond to the fee application by September 20, 1999, *before the CAVC order was issued*, and *that response* would have put Mr. Scarborough on notice of the alleged defect well before the 30-day period had run. In sum, if the government had played by the rules, the amendment would have been filed within the 30-day period.

II. EAJA'S 30-DAY LIMITATIONS PERIOD IS NOT A "JURISDICTIONAL" BAR TO A TIMELY, BUT INCOMPLETE, FEE APPLICATION.

Even if EAJA's 30-day limit is a "jurisdictional" bar to an *untimely* fee application, it is not a bar to a *timely* but incomplete application, which may be amended to supply missing allegations, absent prejudice to the government. That is the view of every circuit to have addressed the question, except for the Federal Circuit. *United States v. True*, 250 F.3d 410, 420-21 (6th Cir. 2001); *Singleton*, 231 F.3d at 857-58; *Dunn*, 775 F.2d at 103-04. The government responds by branding these rulings "judicial policy-making" and proclaiming EAJA's pleading requirements "jurisdictional" in all respects because they involve "the interpretation of a waiver of sovereign immunity." Gov't Br. 30. That broad assertion is addressed in Part I.A. above; as for the remaining arguments on this point, we rest on our opening brief (at 33-36).

III. THE 30-DAY LIMIT DOES NOT APPLY TO THE NO-SUBSTANTIAL-JUSTIFICATION ALLEGATION.

EAJA's 30-day period is contained in the same sentence of 28 U.S.C. § 2412(d)(1)(B) as the three EAJA pleading requirements on which the applicant has the burden, but not in the sentence concerning substantial justification, on which the government has the burden. Thus, the limitations period does not apply to the no-substantial-allegation requirement.

The government has two responses, one based on text and one based on policy, and both unpersuasive. First, the government argues that the second sentence incorporates the 30-day limitations period, because by saying that a party shall

"also" make a no-substantial-justification allegation, that sentence "expressly extends the 30-day deadline to the allegation requirement." Gov't Br. 16. It achieves this result by proclaiming that, in some dictionaries, "one meaning of 'also' is in the same manner." *Id.* But this syntactic magic does violence to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted).

The usual meaning of "also" is "in addition" or "too," *see, e.g.*, *Webster's II New Riverside University Dictionary* 96 (1994) (def. 1) — as in "Mary's brief is due on Wednesday, and John's brief is *also* due on Wednesday" — and that is the meaning intended in section 2412(d)(1)(B). The first sentence lists three items to be included in an EAJA "application," and the second sentence lists *another* item that the "party," not the "application," shall *also* allege. Indeed, the two key differences between the sentences — the lack of the 30-day requirement in sentence two and that sentence one refers to the "application" while sentence two refers to the "party" — simply reinforce that "in the same manner" is *not* the definition of "also" that Congress intended. *See* Opening Br. 37-38.

Second, the government says it "would have made little sense" to have exempted the no-substantial-justification allegation from the limitations period. But this statement flows from the government's fundamental misunderstanding that "making the no-substantial-justification allegation ... is necessary to establish the government's liability for fees in the first place." Gov't Br. 17. That is not so. The government has the burden of showing substantial justification, and the fee applicant need not prove anything about the strength of the

government's position on the merits. *See* Opening Br. 39-40. Therefore, substantial justification is the only topic listed in section 2412(d)(1)(B) that need not be adjudicated before an award can be made. "[T]his simple allegation" reminds the government that, to avoid paying its adversary's fees, it must "make a positive showing that its position and actions during the course of the proceedings were substantially justified.'" Cert. App. 20a (Meyer, C.J., dissenting). Thus, Congress had no need to subject it to the 30-day limitations period.

IV. THE GOVERNMENT'S POLICY ARGUMENTS UNDERMINE ITS POSITION.

The government says that this Court must apply a hard-and-fast rule, lest EAJA applications be delayed and spawn "a second major litigation." *E.g.*, Gov't Br. 24. As for the latter, it is inconceivable that allowing amendments to simple pleading requirements will greatly complicate litigation. After all, three circuits allow amendments to EAJA applications, and the government, which is the defendant in all EAJA cases, has not offered a shred of evidence that EAJA practice in those circuits has caused any problem. Moreover, EAJA pleading omissions will not proliferate under the relation-back rule advanced by Mr. Scarborough, since such omissions offer no opportunity for gamesmanship, and no sensible lawyer would omit a required pleading intentionally. *Compare Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). Moreover, under a relation-back rule, amendments that actually prejudice the government may be denied.

The delay argument is difficult to take seriously. As with any claim for a money judgment, delay *benefits* the defendant, which can hang on to money that may ultimately be payable to a claimant. On the other hand, the EAJA applicant,

being "hungry to see some cash," *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983), will generally file for fees as soon as possible.

Mr. Scarborough's situation is a case in point. He filed his application immediately after he won on the merits, only to be told — wrongly — that his application was premature. Despite the government's lament that this fee dispute has taken "*four years*," Gov't Br. 26 (emphasis in original), if the government had wanted to avoid delay, after service of the fee application, it could have brought the alleged defect to Mr. Scarborough's attention or simply not raised it (given the small chance that the CAVC would have noticed such a minor matter on its own). But just the opposite occurred. The government aggressively pressed its jurisdictional defect argument. And while Mr. Scarborough adhered to briefing deadlines before the CAVC, the Federal Circuit, and this Court, the government sought (and received) extensions at every turn in every forum. *E.g.*, CAVC docket entry 11/3/99; Fed. Cir. docket entries 3, 5, 14, & 16. Although the government had the right to do so, its claim of delay rings hollow.

The government attempts to mitigate its harsh and picayune position by adopting the Federal Circuit's view that, if the application does not "completely fail" to address one of the pleading requirements, the applicant will be given "some latitude" to supplement the application. Gov't Br. 31 (quoting Cert. App. 9a). The "some latitude" standard provides no guidance to litigants or the courts. Indeed, under that standard, the Federal Circuit has excused an EAJA applicant's failure to make any allegation about his fee eligibility (net worth) on the ground that the net-worth allegation is "subsumed" by an applicant's statement that he was the prevailing party, *see Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998), even

though there is no obvious relation between the two concepts. By contrast, the Federal Circuit affirmed the dismissal of Mr. Scarborough's application on the ground that it did not include a no-substantial-justification allegation, even though it contained the prevailing-party allegation, which, if it "subsumes" anything, should subsume the closely-related allegation that the government's position was not substantially justified. Moreover, it is the *government* that, in the first instance, will have to be trusted not to file motions to dismiss where "some latitude" should be allowed. If recent CAVC decisions are any indication, the "some latitude" standard will result in all sorts of government-provoked disputes of the kind that the government claims to deplore and lead to decisions even more hyper-technical than the decision below. *See Urquhardt v. Principi*, 2003 WL 1463586 (Vet. App. 2003); *Billey v. Principi*, 2003 WL 21190651 (Vet. App. 2003).[8]

CONCLUSION

The decision below should be reversed and the case remanded for proceedings on the merits of Mr. Scarborough's fee application.

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[8]The government implies that harsh interpretations such as the Federal Circuit's would only deprive lawyers, not their clients, of money. Gov't Br. 25. Not so. As in Mr. Scarborough's case, in veterans disability cases, the lawyer's statutory contingency fee, which is usually 20% of the veteran's past-due benefits, 38 U.S.C. § 5904(d)(1), is reduced dollar-for-dollar by the EAJA award. *See* Pub. L. No. 102-572, § 506(c), 106 Stat. 4513 (1992). Thus, an EAJA award puts money in the prevailing veteran's pocket. The same is true in social security cases, *see* Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985), which comprise the great majority of EAJA awards. Admin. Office of the U.S. Courts, *1990 Annual Report of the Director — Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24 & Table 20.

Respectfully submitted,

Brian Wolfman
(Counsel of Record)
Scott L. Nelson
Alan B. Morrison
Valerie M. Nannery
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Peter J. Sarda
Wallace, Creech & Sarda, L.L.P.
P.O. Box 12065
Raleigh, NC 27605
(919) 782-9322

January 2004

Counsel for Petitioner Randall C. Scarborough